TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 133.

HENRY HAUENSTEIN, ANNA HAUENSTEIN, LOUISA KRATTIGER, JOHN HAUENSTEIN, BY HIS GUARDIAN, FREDERICK HAUENSTEIN, ET AL., PLAINTIFFS IN ERROR,

vs.

JOHN A. LYNHAM, ESCHEATOR FOR THE COMMONWEALTH OF VIRGINIA.

IN ERROR TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

FILED APRIL 11, 1877.

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1 VIRGINIA:

Pleas before the supreme court of appeals of Virginia, held at the State court-house, in the city of Richmond, on Thursday, the 25th day of January, 1877.

Be it remembered that heretofore came Henry Hauenstein, Anna Hauenstein, Louisa Kratteger, John Hauenstein, by his guardian, Frederick Hauenstein, and Andrew Hauenstein, by his guardian, John Hauenstein, and filed his petition for an appeal from and supersedeas to a decree pronounced by the circuit court of the city of Richmond, on the 20th day of October, 1876, in a proceeding in said court in which the petitioners were plaintiffs, and John A. Lynham, escheator for the Commonwealth of Virginia, was defendant, which appeal and supersedeas was awarded by this court, and the said petition and the record accompanying the same in this court are in these words and figures, to wit:

1½ In the supreme court of appeals of Virginia, Richmond.

HAUENSTEINS
vs.
LYNHAM, ESCHEATOR, &C.

To the hon. judges of the supreme court of appeals for the State of Virginia:

Your petitioners, Henry Hauenstein, Anna Hauenstein, Louisa Krattiger, John Hauenstein, by his guardian, Frederick Hauenstein, Andrew Hauenstein, by his guardian, John Hauenstein, would respectfully show to your honors that they are aggrieved by a decree of the circuit court for the city of Richmond pronounced on the day of October, 1876, in a cause wherein they were plaintiffs and John A. Lynham, escheator for the Commonwealth, was defendant.

A transcript of the record in said cause is herewith filed, which will show the following case:

Solomon Hauenstein died in the city of Richmond in the year 1861 or 1862 by his own hand. He was at the time of his death seized and possessed of considerable real estate situated in said city. An inquisition of escheat was prosecuted by the escheator for that district to a verdict for the Commonwealth, and the escheator in pursuance of law had taken steps to sell said property for the benefit of the Commonwealth. Before the sale was made your petitioners, in conformity with the provisions of the statute law of this Commonwealth, to be found in the
2 Code of 1860, page 547, ch. 113, sec. 8, filed their petition showing to the court that they are the heirs of the said Solomon Hauenstein, and praying that the proceeds of the sale of said property might be paid over to them. Much testimony was taken to show that they were his heirs, but when the cause came on for a hearing the court dismissed their petition, being of opinion that they had no claim under the laws of the land to said proceeds.

The evidence that they are the brothers and sisters of the said Solomon is overwhelming and complete, and the court had no doubt upon that point, but it was of opinion that under the laws of Virginia your petitioners could not inherit the said property or its proceeds from the said Solomon, they being citizens of Switzerland and aliens to the State of Virginia.

Your petitioners will make a brief review of the laws relative to the capacity of aliens to hold and inherit real property in Virginia:

Undoubtedly the common law which forbids aliens to hold or inherit real property prevailed and prevails in Virginia, except as it may be modified by statute law or treaties of the United States made in pursuance of the Constitution. In the year 1832-'3 the legislature of the State modified this common law to the extent of allowing aliens' friends to hold real estate just as a citizen might, upon declaring upon oath in some court of record his intention to remain a resident of the State. (Code 1860, page 56-57, ch. 115, sec. 1.) The second section of this chapter gives his heirs a right to inherit and hold the said property, though also aliens, provided they also came into the State within five years and made a similar declaration on oath. This is the only statute law of Virginia which affects the matter. There is a subsequent provision of the same chapter, section 6, which authorizes aliens to sell and remove the proceeds of real estate whenever by any treaty then in force between the Government of the United States and a foreign government such alien is given that privilege. But this expressly is made applicable to property that might be acquired after that time, and the property in this case was acquired before that time. No attempt is made by your petitioners to claim this property under the provisions of section 2, ch. 115, above referred to, and it seems to them that the laws of Virginia forbid them to have said property on any other conditions; but they base their claims to the proceeds of said property upon the treaty made and entered into between the Government of the United States and the Government of Switzerland in the year 1855, to be found in the 11th volume Statutes at Large, page 590. The Constitution of the United States, Article VI, section 21, provides that treaties made in pursuance of said Constitution shall "be the supreme law of the land, and the judges in every State shall be governed thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." And the Supreme Court of the United States has many times decided that whenever the laws of a State come in conflict with the treaties of the United States Govern-
3 ment, those laws are repealed. (Ware v. Hylton, 3 Dallas R., 199; Shanks et als. v. Dupont, 3 Peters, 242.) If, then, under a fair construction of the treaty between Switzerland and the United States your petitioners have a right to the proceeds of the sale of said real estate, there can be no doubt that the circuit court should have ordered that it be paid to them, though the laws of the State may have forbidden it. The Supreme Court of the United States has always, when treaties between this government and foreign powers came before them for construction, given them the most liberal construction for the purpose of carrying out their intent. As was said by Mr. Justice Story, in Shank v. Dupont, 3 Peters, at page 249, "If the treaty admits of two interpretations, and one is limited and the other liberal, one which will further private rights and the other exclude private rights, why should not the most liberal expositions be adopted?" And obviously it is the duty of the courts to give the most liberal interpretation to the treaties in order to carry out the objects had in view in entering into them. Treaties between powers must in their nature be brief. They are attempts to put in writing the heads only of the agreements which have been come to between the separate sovereignties. The treaty is, as it were, a codification of the laws that are to regulate intercourse between the two powers. As there are many subjects upon which agreements are arrived at, necessarily many details must be omitted from

the written agreement and left to be brought within the influence of the written provisions by fair construction. A fair construction of the treaty between the United States and Switzerland cannot fail to bring your petitioners within its provisions.

Before calling attention to the particular provisions of the treaty it is as well that it should be accurately understood as of what nationality Solomon Hauenstein is to be considered a citizen at the time of his death. Your petitioners do not consider that it is a matter of any real consequence how he is to be treated at his death, whether as a citizen of the United States or as a citizen of Switzerland. Yet, that the matter may be considered accurately, it is as well that this should be understood.

Your petitioners submit that Solomon Hauenstein must be considered by the court to have died a Swiss subject. He is proved to have been born a Swiss subject, and there is no proof that he ever changed his nationality. Now, upon that well-settled principle of evidence, that when a given state of facts is proved the law presumes that state of facts to continue until it be proved affirmatively to have been changed (1 Greenl. Ev., §§ 41–2), the court must presume that Solomon Hauenstein continued a Swiss subject to the day of his death, and that he acquired the real property of which he died seized by going before a court of record and declaring on oath his intention to continue to reside in Virginia according to the statute.

Your petitioners will now call attention to the provisions of the treaty in detail.

4 The first article provides that "the citizens of the United States and the citizens of Switzerland shall be admitted and treated upon a footing of reciprocal equality in the two countries," that is, that the citizens of Switzerland shall be admitted into the United States and treated while here just as citizens of the United States are admitted into Switzerland and treated while there. This is reciprocal equality. Yet the treaty went on to provide that this admission and treatment was to be subject to the State or cantonal laws. That is, if, notwithstanding the provisions of the treaty, there were State laws of the particular State into which the Swiss citizen desired to enter, which provided different conditions upon which he might enter into that State, and different measures for his treatment while there, from what the Swiss government provided for Americans, then those State laws were to remain in force and be respected.

But what meaning is to be given to those two words, admitted and treated? Obviously this, that in the matter of entering into the country (admission), nothing should be required of a Swiss coming to America which was not required of an American going to Switzerland; that is, that a Swiss entering the port of New York should not be required to pay any sum of money as a condition of his landing; should not be required never to have been in the army of his own country; should not be required to be of a certain height or any other like burdensome and vexatious requirements, unless Americans entering into Switzerland were required to undergo such conditions.

Now, as to the word treated. This, obviously, was intended to refer to the rules which were to govern the daily life of the Swiss here, and of the American in Switzerland. It means that a Swiss in America, while sojourning here, after admission, should not be subjected, in his daily life, to vexatious requirements, such as that he should not be required to walk bareheaded in the streets; to eat his dinner at a particular hour; to walk on a certain side of the street, or any other similar vex-

ations obligation, unless Americans were required to do so in Switzerland.

Yet, both these matters were, however, left at last to the State laws. If there were State laws which required these vexatious conditions for admission, and these arbitrary rules of conduct while sojourning here, those laws were to be respected.

Up to this point, and for a considerable way further, the treaty was nothing more than a declaration of amity upon the part of the two governments. It gave no rights to the citizens of either. It only declared that the two governments were completely friendly to each other; but in the matter of citizens of either acquiring rights in the other, that was to be left to the States here and to the cantons in Switzerland.

The same article goes on to provide that a citizen of Switzerland (remaining a citizen of Switzerland, and not becoming naturalized in this country) may acquire property here. Of course, this is still subject to the laws of the State where the property is situated. That is, it provided that the Swiss might acquire property here, remaining a Swiss subject, provided the laws of the State, where he desired to acquire it, permitted it.

The language of the article on this subject is as follows: "To acquire, possess, and alienate therein property (as is explained in article V)." Upon looking to article V we find it to provide that "the citizens of each one of the contracting parties shall have power to dispose of their personal property within the jurisdiction of the other by sale, testament, donation, or in any other manner, and their heirs, whether by testament or ab intestato, or their successors, being citizens of the other party (that is the party other than that where the property is situated), shall succeed to the said property or inherit it," and they may take possession of it and sell it, and remove the proceeds out of the country. Here, for the first time, the treaty gives a substantial right. Up to this article it had amounted to nothing more than a declaration of friendly feeling between the two powers. But in this article the language changes. It is provided that the citizens of each shall have power to dispose of their property situated within the confines of the other, and these heirs shall succeed to such property. The treaty had left it to each State to say whether or not a Swiss citizen might enter into her borders, or might acquire property after entering into them; but it then provided that in case a State allowed a Swiss subject to enter into her territory, and allowed him to once acquire property there, after that no power should rob him of it during his life or prevent his heir from taking it after his death. The State might drive him out of her borders if she chose, or enact that his heir or the person named by his will should not take his property on his death; but in the first case, that is, if she drove him out of the State, the treaty provided that he should have a right to sell his property and carry the proceeds with him; and in the second, if she prohibited his heir from taking the succession, that that heir should have a right to sell such succession and remove the proceeds.

It is to be observed that so far this article has only provided for personal property. The next clause is as follows: "The foregoing provisions shall be applicable to real estate situated within the States of the American Union or within the cantons of the Swiss Confederation in which foreigners shall be entitled to hold or inherit real estate."

What are the "foregoing provisions"? A provision that a citizen of Switzerland, that is, a Swiss not naturalized here, may sell his personal property acquired by permission of the State, and remove its proceeds

to his own country, and in the event of his death that his heir, or the person to whom he might have bequeathed it, being also a Swiss subject, might sell such property and remove the proceeds to his own country. And that was to be the case in respect to real property, provided the real property was situated in a State where foreigners could hold real property (that is, where they had been allowed to acquire real property, as in Virginia, upon making a declaration in a court of record); they were to have the right to sell their real property if the State had ever allowed them to acquire it, and their heirs being citizens of Switzerland were to have a right to inherit it, provided the laws of the State permitted such an inheritance. But the commissioners making the treaty went on to provide for that case also, viz, the case of the law of the State not permitting the heir to take the real property, and the next clause reads as follows:

"But in case real estate situated within the territories of one of the contracting parties should fall to a citizen of the other party, who, on account of his being an alien, could not be permitted to hold such property in the State or in the canton in which it may be situated, there shall be accorded to the said heir or other successor such time as the laws of the State or canton will permit to sell such property" and remove the proceeds.

There can be no doubt of these propositions, that these provisions, taken together, give a Swiss subject an absolute right to sell his real property if a State government has ever allowed him to acquire real property (as in the case of the Virginia law upon making a declaration in a court of record), and to remove the proceeds of the sale to his own country, in case the State should ever drive him from her territory, or in case he should desire to quit it. And if such an one, that is, a Swiss subject who had acquired real property here by permission of the State, should die seized of it, it is equally clear that his heir, being also a Swiss subject, would have an absolute right to sell such property and remove the proceeds. There can be no doubt about these propositions, and if it be true, as pointed out in the beginning of this petition, that Solomon Hauenstein is to be presumed to have lived and died a Swiss subject, then there can be no question about the right of your petitioners to the proceeds of his real estate. But the learned judge of the circuit court was of opinion that he must treat Solomon Hauenstein as a Swiss subject who had become naturalized as an American citizen, and that it was not the purpose of the treaty to provide for the Swiss heirs of an American citizen.

Upon the question whether or not Solomon Hauenstein is to be treated as a Swiss citizen or an American citizen, your petitioners have said all that they can say. They are advised that it is one of the most elementary principles of the law of evidence, that a given state of facts once proved to exist is always presumed by the law to continue to exist until the contrary of it be affirmatively proved. And as Solomon Hauenstein is proved to have been born a Swiss subject, to have come to this country a Swiss subject, and as there is nothing found in his life inconsistent with his having remained a Swiss subject (as it was entirely consistent with his remaining a Swiss subject for him to have acquired his property upon making the necessary declaration in a court of record), it is submitted that the court must presume that he remained a Swiss subject to the day of his death; and if he did, then no one can doubt your petitioners' rights.

But it is submitted, nevertheless, that the construction put upon the last-quoted clause of the treaty by the learned judge of the circuit

7 court is wholly and entirely wrong, and that your petitioners would be equally entitled to the proceeds of Solomon Hauenstein's real estate, whether he died an American citizen or whether he died a Swiss citizen. That that clause is intended to apply equally to Swiss heirs claiming from an American citizen as to Swiss heirs claiming from a Swiss citizen.

The language of the clause is, "But in case real estate situated within the territories of one of the contracting parties should fall to a citizen of the other party."

Now the argument is this: The commissioners had, up to this point, been dealing solely with the case of a Swiss citizen having property in America, or an American citizen having property in Switzerland, and the case of the succession to such property. Having provided an absolute right to such Swiss or American citizen to sell his property, it occurred to them that it might be real estate, and that the laws of the country where it was situated might not permit such citizen's heir (being an alien) to inherit his real property. Therefore they at once provided that in such a case as that, viz, the one they had been speaking of, the Swiss heir should have the right to sell.

If this was the only case which the commissioners intended to cover, viz, the case of a Swiss heir claiming from a Swiss subject, why then, of course, the case of a Swiss heir claiming from an American subject is not provided for, and such an one can claim nothing under the treaty. If, however, it can be gathered by a proper construction of the treaty (which the courts have always held must be a liberal and not a narrow one) that they intended to provide for such a case, then the Swiss heir claiming from an American subject must be protected.

It is at last but a question of what was the intention of the commissioners, to be gathered from the language of the treaty itself and from a consideration of all the circumstances surrounding them when they entered into it, that may have presumably affected their minds.

Let it be observed first that there is nothing in the language used which would at all exclude the case of a Swiss citizen claiming from an American citizen. The words are as apt for describing such a case as for describing the case of a Swiss citizen claiming from a Swiss citizen. Indeed they are not apt for describing either where the property was situated in Virginia. The laws of Virginia equally forbade a Swiss citizen to inherit property which they had permitted another Swiss citizen to acquire, as they forbade a Swiss citizen to inherit property from an American citizen. So that in neither case could property correctly be said to have "fallen to" a Swiss citizen, since in either case, immediately upon the death of the owner, the title devolved upon the commonwealth. So that the words have as much correct pertinency in the one case as in the other.

There being, therefore, nothing in the words used to confine them to the case of a Swiss citizen claiming from a Swiss citizen, and noth-
8 ing which does not make them as applicable to the case of a Swiss citizen claiming from an American subject as to the other case, is it not to be presumed that the commissioners intended to embrace both cases?

It is to be presumed that the most cogent reasons operated upon the minds of the commissioners for the government of Switzerland to induce them to include the case of Swiss heirs to American citizens as well as that of Swiss heirs to Swiss citizens; indeed, more cogent reasons in the first than in the second case. Manifestly there had been large emigration from Switzerland, an old and thickly populated country, to

America, a new land and a land of promise. As was well known, the emigrants to this country being at once accorded a voice in the government of the country as soon as they qualified themselves to vote by being naturalized, as was well known, in ninety-nine cases out of every hundred, those emigrants had thrown off their old allegiance and become citizens of the United States. As was likewise well known, such citizens were generally thrifty and had acquired property, and in very many instances, upon dying, their only relatives were those whom they had left behind them in the old land. Now the State laws in such cases forbade their natural heirs to take their property and escheated it to the commonwealth, and naturally this was viewed by all Switzerland as a great hardship and injustice. This, therefore, was just the case which every man of common sense at all acquainted with the subject must presume that the Swiss commissioner wanted to provide for.

Whereas the other, that of a Swiss citizen claiming from a Swiss citizen, was a case not likely to have attracted much of their attention, because one not likely to arise. In but few instances where foreigners come into the United States do they fail to become naturalized in order that they may vote. And in most of the States they were forbidden to acquire property until they had become naturalized. Your petitioners apprehend that the provision of the Virginia law allowing an alien to acquire real estate upon making the proper declaration in court, is an exceptional one, and existing in but few of the States. Therefore the evil to be remedied by the Swiss commissioners was not so much the inability of a Swiss citizen to take the property of his relative who had died in America a Swiss citizen, as the inability of a Swiss citizen to take the property of his relative who had died in America an American citizen.

It is to be presumed that the commissioners on the part of the United States had the same object in view. They were representing a government which was soliciting immigration from the world at large, that its forests might be felled and its waste places built up. Clearly, the inducements to immigration would be enhanced should it be published at large that the United States guaranteed to the immigrant all the rights of citizenship in his new home, with the assurance that such property as he might acquire should certainly go the loved ones whom he had left in the old land.

And it had been the settled policy of the government of the
9 United States to hold this inducement out to emigrants from the old world from its beginning. The treaty of 1800 with France, to be found in the volume of the Revised Statutes relating to Post Roads and Public Treaties, page 226 of the public treaties, article VII, is as follows: "The citizens and inhabitants of the United States shall be at liberty to dispose by testament, donation or otherwise, of their goods, movable and immovable, holden in the territory of the French Republic in Europe, and the citizens of the French Republic shall have the same liberty with regard to goods movable and immovable, holden in the territory of the United States, in favor of such persons as they shall think proper. The citizens and inhabitants of either of the two countries, who shall be heirs of goods, movable or immovable, in the other, shall be able to succeed ab intestato, without being obliged to obtain letters of naturalization, and without having the effect of this provision contested or impeded under any pretext whatever; and the said heirs, whether such by particular title or ab intestato, shall be exempt from any duty whatever in both countries. It is agreed that this article shall in no manner abrogate from the laws which either State

may now have in force, or hereafter may enact to prevent emigration; and also, that in case the laws of either of the two States should restrain strangers from the exercise of the rights of property with respect to real estate, such real estate may be sold, or otherwise disposed of, to citizens or inhabitants of the country where it may be."

It will be seen from the perusal of this that the Government of the United States guaranteed to Frenchmen acquiring property here, whether they remained French citizens or whether they became American citizens, that their heirs in the old country should have that property.

We find a provision to the same effect, only more explicit, in the treaty of 1848 with Austria. Ib. 25, article II, reads as follows:

"When, on the death of any person holding real property, or property not personal, within the territories of one party, such real property would, by the laws of the land, descend on a citizen or subject of the other, were he not disqualified by the laws of the country where such property is situated, such citizen or subject shall be allowed a term of two years to sell the same, which term may be reasonably prolonged according to circumstances, and to withdraw the proceeds thereof without molestation, and exempt from any other charges than those which may be imposed in like cases upon the inhabitants of the country from which said proceeds may be withdrawn." This gives the right of inheritance without respect to what may have been the citizenship of the party dying. The same provision is found ipsissimis verbis in the treaty of 1845 with Bavaria. (Ib. p. 11, article II.)

The same is found in the treaty of 1854, with Brunswick and Lunenberg. (Ib. 93, article II.)

The same provision is found in the treaty of 1867, with the Dominican Republic. (Ib. 179, article V.)

The same provision is found in the treaty with Hanover of 1846. (Ib. 390, article VII.)

The same provision is found in the treaty of 1844 with Hesse Cassel. (Ib. 422, article II.)

The same provision is found in the treaty with Mecklenburg Schwerin, 1847. (Ib. 471, article IV.)

The same provision is found in the treaty with Nassua of 1846. (Ib. 531, article II.)

The same provision is found in the treaty with Portugal of 1840. (Ib. 637, article XII.)

The same provision is found in the treaty with Prussia as far back as 1875. (Ib. 643, article X.)

The same provision is found in the treaty with Russia of 1832. (Ib. 669, article X.)

The same provision is found in the treaty with Sardinia of 1838. (Ib. 688, article XVIII.)

The same provision is found in the treaty with Saxony of 1845. (Ib. 690, article II.)

The same provision is found in the treaty with Spain as far back as 1795. (Ib. 707, article XI.)

The same provision is found in the treaty with Wurtemburg of 1844. (Ib. 809, article II.)

With these treaties before us all providing for an alien heir taking property possessed by his ancestor in this country, whether that ancestor was an American citizen, or whether he was an alien, and with the general reason for the thing, it cannot be doubted that it has always been the settled policy of this government to hold out to foreigners, as

an inducement to make them come here, the guaranty that their heirs at home should take such property as they might acquire here, regardless of what citizenship the acquirer of the property might hold. And in construing this treaty this settled policy of our government must be supposed to have completely controlled the commissioners for the Government of the United States. But the most significant circumstances to show that this treaty was intended to cover both cases remains yet to be referred to. The first treaty between this government and the Swiss Confederation was made in 1847. (2 Rev. Stat., 747.) Article I of that treaty gave the citizens of each government the right to dispose of their personal property. Article II is in these words: "If, by the death of a person owning real property in the territory of one of the contracting parties, such property would descend, either by the laws of the country, or by testamentary disposition, to a citizen of the other party, who, on account of his being an alien, could not be permitted to retain the actual possession of such property," a reasonable time shall be allowed him to sell and withdraw the proceeds. Now, this provision of the treaty of 1847 gave the Swiss the right in terms to inherit from any one, no matter what his citizenship. This remained the only
11 treaty between the United States and Switzerland until the treaty of 1850 (Ib. 748), under which your petitioners are claiming.

In making that treaty the commissioners changed the language in respect to inheriting property from what it had been in the treaty of 1847 to what it is as already quoted. Now, the commissioners found Swiss subjects under the old treaty guaranteed the right to inherit from their ancestors in America, whether those ancestors had changed their citizenship or not.

Can it be presumed that the commissioners, in making the new treaty, intended to limit the privileges of the citizens of each country, and make them smaller than they had been under the old treaty which they were attempting to improve upon? It is impossible to suppose so.

Besides, to have done it would have been to practice a direct fraud upon all Swiss who had emigrated to America since the making of the treaty of 1847, and become citizens of America. They had emigrated and became citizens of America upon the express assurance that whatever property they might acquire should descend to their heirs in Switzerland. If the new treaty was to give a right to inherit the property of Swiss subjects alone, then those who had changed their citizenship would have been directly swindled.

Is putting the construction on the article in question which the learned judge of the circuit court put upon it at all in conformity with the language of Mr. Justice Story in Shanks v. Dupont (3 Peters, 249), already quoted? "If the treaty admits of two interpretations, and one is limited and the other liberal, one which will further private rights, and the other exclude private rights, why should not the most liberal expositions be adopted?

It is submitted that the language used is as apt for describing the case of a Swiss claimant to an American's property as to a Swiss claimant of a Swiss' property. And it is also submitted that there is every reason to suppose the commissioners intended to include both cases, and not the semblance of a reason for supposing they intended to exclude either. The plain meaning of the article is this: "If the State government should allow a Swiss subject to acquire property, real or personal, then that subject shall have a guaranteed right to dispose of that property and remove the proceeds out of the country. And upon the death of such Swiss subject, if the State laws allow his heir to take his

property, well and good, he may take it; but in case of the death of any man, Swiss subject or American subject, whose natural heir is a Swiss subject, if the laws of the State where the property is situated do not allow such heir to take and hold the property, he shall then have a reasonable time in which to sell it and carry the proceeds out of the country."

Your petitioners deem it unnecessary and out of place in this petition to comment upon the conflict in the evidence as to whether or not Solomon Hauenstien was ever in the Mexican war. That is a question of
12 fact, to be judged of by weighing the testimony on either side. It is obvious, however, upon reading the testimony that the witness Poe was mistaken. The most pregnant evidence is that of the original letters themselves, which could not have been forged or prepared—that is, the post and other marks on which by the most skilled of counterfeiters, let alone by unlearned peasants like your petitioners. Your petitioners will pray that those letters themselves may be brought into court upon a writ of subpœna duces tecum for the inspection of your honors.

For these errors your petitioners pray that an appeal may be allowed them from the aforesaid order or decree of the said circuit court.

PETITIONERS,
By Counsel.

We are respectfully of opinion that the decree or order complained of in the foregoing petition should be reviewed and reversed.

JOHNSON & ROYAL,
Counsel Practicing in the Supreme Court of Appeals.

Appeal allowed and superseas awarded. Bond required in the penalty of $100, conditioned as the law directs.

JOS. CHRISTIAN.

NOV'R, 1876.

VIRGINIA:

Pleas before the circuit court of the city of Richmond, at the court-room in said city, on the 20th day of October, 1876:

Be it remembered that heretofore, to wit, at a circuit court of the city of Richmond, held at the court-room in said city on Thursday, March 30th, 1876, came John Hauenstein, by his guardian Frederick Hauenstein, Andreas Hauenstein, by his guardian Johnan Hauenstein, Henry Hauenstein, and Louisia Kratiger, by counsel, and filed their petition against John A. Lynham, escheator for the commonwealth for Richmond City, and thereupon the said John A. Lynham, by consent in writing attached to said petition, waives the service of process, and acknowledges service of said petition, and consents to the docket-
13 ing of this cause. And, on motion of the parties by counsel, it was ordered that this cause be docketed, which petition, together with the acknowledgment of service thereon, is in the words and figures following, to wit:

Petition.

To the Hon. B. R. Wellford, judge of the circuit court of the city of Richmond:

Your petitioner, Johan Hauenstein, by his guardian, Frederick Hauenstein, Andreas Hauenstein, by his guardian, Johan Hauenstein, Henry

Hauenstein, Anna Hauenstein, and Louisa Kratiger, would respectfully represent that the aforesaid Johan Hauenstein, Andreas Hauenstein, Henry Hauenstein, and Anna Hauenstein are the only surviving brothers and sisters of Solomon Hauenstein, who died in Richmond, Virginia, in the year 186–, and that the aforesaid Louisa Kratiger is the daughter of a deceased sister of the said Solomon. No other brother or sister of the said Solomon have died leaving children or a child; the father and mother of the said Solomon are dead, so that by the laws of Switzerland, where some of your petitioners reside and of which they are all citizens, and by the laws of Virginia, your petitioners are the heirs and sole heirs of the said Solomon. Your petitioners would respectfully show that the said John Hauenstein and Andrew Hauenstein have emigrated from Switzerland to some part of the world unknown to your petitioners, and that in accordance with a law passed by the government of Switzerland your petitioners, Frederick Hauenstein and Johan Hauenstein, have been constituted their guardians with full power to represent them in all respects. Your petitioners would further show that the said Solomon died in the city of Richmond in the year 186–, unmarried and without having ever been married, seized and possessed of considerable real estate in the city of Richmond, which, by a verdict of inquest, has been escheated to the commonwealth of Virginia in the suit of inquisition for the escheat of said property, a certified copy of which inquisition is herewith filed, marked XYZ, and prayed to be taken as part of this petition. In conformity with the provisions of the statute law of this land and the treaty between the Governments of the United States and Switzerland, your petitioners pray that the said property, or its proceeds after a sale, in which they are willing to unite, may be ordered to be given to them. They pray that John A. Lynham, escheator of the commonwealth for Richmond City, be made a party defendant hereto.

They pray that this, their petition, may be treated as such, or as a bill in equity, as the case may *be* require.

PETITIONERS,
By counsel, WM. L. ROYALL, *P. Q.*

14 Without conceding or yielding any legal rights of objection, opposition, or otherwise, I acknowledge service of the petition, waive the service of process, and consent to the docketing.

J. A. LYNHAM,
Escheator for Comm'th.

Inquisition, marked XYZ, referred to in foregoing petition.

An inquisition at the court-house of the hustings court for the city of Richmond on this the 18th day of May, 1868, before me, Sam'l M. Page, escheator for the said city, by James Kersey, Corbin Warwick, John T. Sublett, Thomas J. Starke, W. W. Snead, N. Devereux, William Holt Richardson, F. H. Habliston, Charles Gennett, R. P. Davis, W. J. Yarbrough, and P. H. Starke, freeholders of the said city, duly summoned and empannelled by the sergeant of the said city to take this inquisition, and who being by me, as escheator for the said city, charged and sworn truly and impartially to enquire whether Solomon Hauenstein died seized of an estate of inheritance in certain lots, pieces or parcels of land lying and being in the said city, being six lots of land lying and being in the said city on or near New street, and whether, if he so died seized of the said lots, pieces, or parcels of land, he died intestate and

without heirs, and whether any person is known to be entitled to the said lots, pieces, or parcels of land, do, upon their oaths aforesaid, say that the said Solomon Hauenstein did die seized of an estate of inheritance in the said lots, pieces, or parcels of land lying in the said city, being the six lots lying on or near New street, and that the said Solomon Hauenstein so died seized of an estate of inheritance in the said land intestate and without heirs, and that there is no person known to us, the jurors aforesaid, to be entitled to the said six lots, pieces or parcels of land, but this, that the said six lots, pieces or parcels of land have been sold by a decree of the circuit court of the county of Henrico to satisfy an office judgment obtained against the estate of the said Solomon Hauenstein since his death, and that there are now certain parties in possession of the said lots, pieces, or parcels of land claiming under the said sale.

JAS. KERSEY.
W. W. SNEAD.
CORBIN WARWICK.
JOHN T. SUBLETT.
W. J. YARBROUGH.
F. H. HABLISTON.
CHAS. GENNETT.
N. DEVEREAUX.
THOS. J. STARKE.
P. H. STARKE.
ROBERT P. DAVIS.
W. HOLT RICHARDSON.

15 Sam'l M. Page, escheator for the city of Richmond; commonwealth represented by Raleigh T. Daniel, attorney for commonwealth.

SAM'L M. PAGE,
Escheator for City of Richmond.

A copy—Teste:

ALFRED SHIELD, *Clk.*

And at another day, to wit:

At a circuit court held as aforesaid, on the 13th day of April, 1876, came the defendant, John A. Lynham, escheator for the commonwealth, by counsel, and with the leave of the court, filed his answer to the petition of the plaintiffs, to which answer the plaintiffs, by counsel, replied generally, which answer is in the words and figures following, to wit:

Answer of John A. Lynham, escheator.

To the honorable judge of the circuit court of Richmond:

In answer to the petition herein filed on the part of several persons residing in Switzerland, and claiming to be the heirs-at-law of one Solomon Hauenstein, whose lands escheated to the commonwealth, your respondent, the present escheator, representing, as it is his duty, the commonwealth of Virginia in this respect, answering, says:

After the long and tedious litigation over the subject-matter of this petition, when every legal as well as equitable consideration has been so repeatedly urged from this court to the supreme court of this State, with all the serious consequences that have resulted to some from the contest over the Hauenstein estate, the wish may be pardoned that

the innocent and unwitting subject of this litigation might now rest in peace.

But this petition having been filed, the statute (sec. 8 ch., 109 of Code of 1873) requires the escheator to "answer and state the objections to the claim." The first objection that your respondent has to state is this: These petitioners have not now, and never had any legal title whatever to this property, and there was never a time when they could (and cannot now) assert any right in law to the property or its proceeds; this court has not only twice decided, but recently the court *court* of appeals of Virginia has fully and unanimously affirmed these decisions, and by strong and elaborate opinion decreed that the title unimpaired remains vested in the commonwealth of Virginia.

Your respondent denies the existence of these self-styled heirs
16 of Solomon Hauenstein, dec'd, and if the parties, as named, reside in Switzerland, that they are the next of kin or bear any relation to the decedent, whose estate they here claim. But conceding the statement of the petition in this respect to be true, they, as aliens, never succeeded to any right or title to this property on the death of Hauenstein; for by the law then in force in this State they could not heir, and by the escheat the title vested in the commonwealth, where it has ever remained. Sec. 6 of chapter 115 of the Code of 1860, as an act of comity between nations granted the right of inheritance to subjects of a foreign country, provided that the laws of such foreign country extended such rights to our citizens; but it was therein further provided that such inheritance should apply only to real estate thereafter purchased and acquired. Hauenstein, an alien and subject of a foreign country, acquired the real estate in question in September, 1856. The above mentioned act was passed in 1858. Furthermore, if there was no such treaty of comity as before mentioned existing at the time (and we deny that there was), then it became unnecessary* for the alien claiming the inheritance to declare his intentions of citizenship and take up his domicile here. Thus stood the law up to the time of Hauenstein's death, which was in 1863. By the acts of 1866-'7 these sections 2, 3, 4, 5, 6, and 7, of said chapter 115, Code of 1860, were repealed; but section 1st of said chapter, requiring residence here with a declaration, continued in force until amended by the act of March 19th, 1873, which permitted the estate to pass to aliens without the conditions or requirements before mentioned. It will not be contended that this last act is retroactive; and furthermore, on the 18th of May, 1868, the title passed to the commonwealth by the escheat. Having thus hurriedly made my objections to the claim of these petitioners, based upon their supposed legal rights, I ask what is the nature of their equitable demand? Upon this point the petition itself is silent, and I think very properly so, for if they have any equitable rights to assert I am at loss to know upon what it is founded.

I respectfully submit that the prayer of this petition should be denied by the court.

J. A. LYNHAM,
Escheator for the Commonwealth of Virginia.

And on the 10th day of May, 1876, came John A. Lynman, and filed in the clerk's office of the said circuit court a supplemental answer to the petition of the plaintiffs, which answer is in the words and figures following, to wit:

*(On the margin in pencil)—necessary.

without heirs, and whether any person is known to be entitled to the said lots, pieces, or parcels of land, do, upon their oaths aforesaid, say that the said Solomon Hauenstein did die seized of an estate of inheritance in the said lots, pieces, or parcels of land lying in the said city, being the six lots lying on or near New street, and that the said Solomon Hauenstein so died seized of an estate of inheritance in the said land intestate and without heirs, and that there is no person known to us, the jurors aforesaid, to be entitled to the said six lots, pieces or parcels of land, but this, that the said six lots, pieces or parcels of land have been sold by a decree of the circuit court of the county of Henrico to satisfy an office judgment obtained against the estate of the said Solomon Hauenstein since his death, and that there are now certain parties in possession of the said lots, pieces, or parcels of land claiming under the said sale.

JAS. KERSEY.
W. W. SNEAD.
CORBIN WARWICK.
JOHN T. SUBLETT.
W. J. YARBROUGH.
F. H. HABLISTON.
CHAS. GENNETT.
N. DEVEREAUX.
THOS. J. STARKE.
P. H. STARKE.
ROBERT P. DAVIS.
W. HOLT RICHARDSON.

15 Sam'l M. Page, escheator for the city of Richmond; commonwealth represented by Raleigh T. Daniel, attorney for commonwealth.

SAM'L M. PAGE,
Escheator for City of Richmond.

A copy—Teste:

ALFRED SHIELD, *Clk.*

And at another day, to wit:

At a circuit court held as aforesaid, on the 13th day of April, 1876, came the defendant, John A. Lynham, escheator for the commonwealth, by counsel, and with the leave of the court, filed his answer to the petition of the plaintiffs, to which answer the plaintiffs, by counsel, replied generally, which answer is in the words and figures following, to wit:

Answer of John A. Lynham, escheator.

To the honorable judge of the circuit court of Richmond:

In answer to the petition herein filed on the part of several persons residing in Switzerland, and claiming to be the heirs-at-law of one Solomon Hauenstein, whose lands escheated to the commonwealth, your respondent, the present escheator, representing, as it is his duty, the commonwealth of Virginia in this respect, answering, says:

After the long and tedious litigation over the subject-matter of this petition, when every legal as well as equitable consideration has been so repeatedly urged from this court to the supreme court of this State, with all the serious consequences that have resulted to some from the contest over the Hauenstein estate, the wish may be pardoned that

the innocent and unwitting subject of this litigation might now rest in peace.

But this petition having been filed, the statute (sec. 8 ch., 109 of Code of 1873) requires the escheator to "answer and state the objections to the claim." The first objection that your respondent has to state is this: These petitioners have not now, and never had any legal title whatever to this property, and there was never a time when they could (and cannot now) assert any right in law to the property or its proceeds; this court has not only twice decided, but recently the court *court* of appeals of Virginia has fully and unanimously affirmed these decisions, and by strong and elaborate opinion decreed that the title unimpaired remains vested in the commonwealth of Virginia.

16 Your respondent denies the existence of these self-styled heirs of Solomon Hauenstein, dec'd, and if the parties, as named, reside in Switzerland, that they are the next of kin or bear any relation to the decedent, whose estate they here claim. But conceding the statement of the petition in this respect to be true, they, as aliens, never succeeded to any right or title to this property on the death of Hauenstein; for by the law then in force in this State they could not heir, and by the escheat the title vested in the commonwealth, where it has ever remained. Sec. 6 of chapter 115 of the Code of 1860, as an act of comity between nations granted the right of inheritance to subjects of a foreign country, provided that the laws of such foreign country extended such rights to our citizens; but it was therein further provided that such inheritance should apply only to real estate thereafter purchased and acquired. Hauenstein, an alien and subject of a foreign country, acquired the real estate in question in September, 1856. The above mentioned act was passed in 1858. Furthermore, if there was no such treaty of comity as before mentioned existing at the time (and we deny that there was), then it became unnecessary* for the alien claiming the inheritance to declare his intentions of citizenship and take up his domicile here. Thus stood the law up to the time of Hauenstein's death, which was in 1863. By the acts of 1866-'7 these sections 2, 3, 4, 5, 6, and 7, of said chapter 115, Code of 1860, were repealed; but section 1st of said chapter, requiring residence here with a declaration, continued in force until amended by the act of March 19th, 1873, which permitted the estate to pass to aliens without the conditions or requirements before mentioned. It will not be contended that this last act is retroactive; and furthermore, on the 18th of May, 1868, the title passed to the commonwealth by the escheat. Having thus hurriedly made my objections to the claim of these petitioners, based upon their supposed legal rights, I ask what is the nature of their equitable demand? Upon this point the petition itself is silent, and I think very properly so, for if they have any equitable rights to assert I am at loss to know upon what it is founded.

I respectfully submit that the prayer of this petition should be denied by the court.

J. A. LYNHAM,
Escheator for the Commonwealth of Virginia.

And on the 10th day of May, 1876, came John A. Lynman, and filed in the clerk's office of the said circuit court a supplemental answer to the petition of the plaintiffs, which answer is in the words and figures following, to wit:

*(On the margin in pencil)—necessary.

Supplemental answer.

Hon. B. R. Wellford, judge circuit court city of Richmond:

Since filing my answer as escheator in the matter of a petition of
17 certain Swiss subjects against the commonwealth, claiming the proceeds of the sale of the Hauenstein property, I have to report as supplemental thereto, that I have made sale of all of said property and received from Messrs. Goddin, Warren & Co. the net cash proceeds of their sale, amounting to $950.90, which I have deposited to my credit as escheator in the Richmond Banking and Insurance Co. Also, I have the notes of the purchasers for the deferred payments at six and twelve months, as follows:

Jno. Phelan,	note	6	mos.	$171 67
Do.	"	12	"	176 69
Jos. Vanderlehr,	"	6	"	453 20
Do.	"	12	"	466 40
Wm. Baker,	"	6	"	370 80
Do.	"	12	"	381 60
Jno Dooley,	"	6	"	177 69
Do.	"	12	"	182 88
				$2,380 93

From the cash proceeds will of right be deducted the commissions allowed to the escheator by law, and proper counsels' fees for representing him in the litigations before this court and in the court of appeals of the State, and the residue will be held subject to the decision of your honor upon the petition mentioned.

Respectfully submitted,

J. A. LYNHAM,
Escheator.

[The report of E. J. Warren, and the sundry vouchers filed therewith, are not copied in this record, by direction of the plaintiffs' counsel.]

The depositions of Anna Hauenstein and others, taken at Zurich, Switzerland, on the first day of May, 1876, on behalf of the plaintiffs, and filed on the 18th day of May, 1876.

Deposition of Anna Hauenstein.

ANNA HAUENSTEIN, being sworn, deposeth and saith as follows:

I am 65 years of age. I am the daughter of Andreas Hauenstein and Maria Hauenstein, both deceased. I am a sister of Solomon
18 Hauenstein, who died at Richmond, in the State of Virginia, about ten years ago. Besides Solomon Hauenstein, I had four brothers and two sisters; the sisters and two of the brothers are dead; two other brothers, Andreas and Joahn Hauenstein, have also been declared dead in the eyes of the law by a decree of the court of Zurzach, Switzerland. They have been many years absent from the country, and their whereabouts, if alive, is entirely unknown to me. One brother, Henry Hauenstein, is still living, and resides at Unterendingen, Canton Argan, Switzerland. One of my deceased sisters, named Louisa Hauenstein, married Gottlieb Krattiger, deceased; this sister, Louisa, died at Basle, Switzerland, on the 3rd of August, in the year 1859. The only child of

my said sister Louisa and Gottleib Krattiger, her husband, deceased, as aforesaid, is Louisa Krattiger, now living at Oberdorf, Switzerland. I have been shown the five letters referred to in the deposition of my brother, Henry Hauenstein, and I fully believe them to be in the handwriting of my deceased brother, Solomon Hauenstein.

(Signed in a foreign language, unintelligible to me.—A. S.)

Deposition of Henry Hauenstein.

HENRY HAUENSTEIN deposeth and says:

I am 63 years old. I am a brother of Solomon Hauenstein, of Unterendinger, who died at Richmond, Virginia, in 1862. I am the son of Andrea' Hauenstein, and Marie, his wife, both deceased. Besides Solomon Hauenstein, I had two brothers, Joan Hauenstein, born August 25th, 1805, and Andrew Hauenstein, born Octo. 23d, 1808, both now declared dead by a decree of the court of *Zurzach*, Switzerland. I had three sisters, Marie Hauenstein, who died unmarried, who died about 1853; Louisa Hauenstein, who married Gottlieb Krattiger, and died Aug. 3d, 1869, and Anna Hauenstein, who now lives at Unterendingen, Switzerland. My sister, Louisa Hauenstein, married to Gottleib Krattiger, died Aug. 3d, 1859. The only offspring of my sister Louisa and her husband, Gottlieb Krattiger, was one daughter, Louisa Krattiger by name, and now living at Oberdorf, Canton Baseland. I have carefully examined the five letters attached to these depositions and marked A, B, C, D, E, and dated at Richmond, Va., Feb. 4th, 1846, 19th July, 1846, 12th July, 1847, 3d July, 1848, and March 18th, 1859, respectively. These letters were all received by me from my brother, Solomon Hauenstein, deceased, then in Richmond; they were brought to me at my house, just as they are, by the postmaster of Unterendingen, Switzerland. Four of these letters were addressed to me on the outside, and one was sent in an envelope. I know that these letters were from my said brother, Solomon Hauenstein, for the following reasons:

19 1st. I am perfectly acquainted with the handwriting of my deceased brother, and believe these letters to have been written by him; and

2nd. For the reason that they contain matter which I consider perfectly impossible to have been known to other parties than my said brother, Solomon Hauenstein.

Further saith deponent not.

(Signed in a foreign language, unintelligible to me.—A. S.)

Deposition of Louisa Krattiger.

LOUISA KRATTIGER deposeth and says:

I am 23 years of age. I am the only child of Gottlieb Krattiger and his wife, Laura Hauenstein. My mother died some sixteen years ago. My father died, as I have learned by letter, in the United States, April 7th, 1874. My mother was a sister of Solomon Hauenstein, who died at Richmond, Va., in 1862, so I am a niece of the said Solomon Hauenstein, deceased, and whose estate is now in litigation in the circuit court of Richmond, Va. My mother, Laura Hauenstein, was the same person alluded to by the preceding deponents.

Further saith deponent not.

(Signed in a foreign language, unintelligible to me.—A. S.)

Deposition of Frederick Hauenstein.

FREDERICK HAUENSTEIN, being sworn, deposeth and says:

I am 49 years old, and was the legal guardian of Joahan Hauenstein, deceased, who was born August 25th, 1865, and who has recently, on account of long protracted absence, been declared dead by the court of Zurzach, Canton Argan, Switzerland, and was appointed guardian of the said Johan Hauenstein by the district court of Zurzach, in Switzerland. I am in no way related to Johan Hauenstein, whose guardian I was. I live in the same town, Unterendingen, and always have lived there, where Johan Hauenstein is from, and I know that my said ward, Joham Hauenstein, and Solomon Hauenstein, deceased, of Richmond, Va., were brothers. Unterendingen is a small hamlet, of only 32 citizens, so that the family relations of each is well known to all the citizens of this place. I was acquainted with Solomon Hauenstein, de-
20 ceased, of Richmond, Va., and I am perfectly positive that he was a brother of Henry Hauenstein, who deposed previously.

Further saith deponent not.

(Signed in a foreign language, unintelligible to me.—A. S.)

The deposition of Johann Hauenstein.

JOHANN HAUENSTEIN, aged 49 years, deposeth and says:

I was guardian of Andreas Hauenstein, who was born 25th October, 1808, and who has recently been declared dead by a decree of the court of Zurzach, Switzerland, owing to his whereabouts not having been known since the year 1840. I am in no way related to my said ward, Andreas Hauenstein. I am a native of the little hamlet of Unterendingen, where I have lived from my childhood, and where I still live. I know my said ward, Andreas Hauenstein, personally. I also knew personally Solomon Hauenstein, deceased, of Richmond, Va., and I knew him to be a brother of the said Andreas Hauenstein and a brother of Henry Hauenstein, who testified here to-day. I know, also, Anna Hauenstein, and know her to be a sister of Solomon Hauenstein, deceased, and of Henry Hauenstein. I also knew Louisa Hauenstein, who married Gottlieb Krattiger, deceased, and knew her to be a sister of the said Solomon Hauenstein, who died at Richmond, Va., in 1862. Said Louisa Hauenstein died many years ago. The only offspring of her marriage with Gottlieb Krattiger was one daughter, Louisa Krattiger, whose depositions were taken to-day. Unterendingen is a very small hamlet, where the citizens are all acquainted with each other. Solomon Hauenstein, Andreas Hauenstein, Henry Hauenstein, Anna Hauenstein, and Louisa Hauenstein were always known in the community as children of Andreas Hauenstein, senior, and his wife, Marie Hauenstein.

Further saith deponent not.

(Signed in a foreign language, unintelligible to me.—A. S.)

The deposition of Jacob Hauenstein.

JACOB HAUENSTEIN, being duly sworn, deposeth as follows:

I am 61 years old, and am a native of the town of Unterendingen, Switzerland, where I have lived all my life, and where I still live. I have been many years president of the communal council of the
21 village of Unterendingen. It is a small place, of only thirty-two citizens. I know everybody in the village, and am, by reason of

my office, acquainted with the family relations of everybody there. I especially knew the family of Andreas Hauenstein, senior, and Marie Hauenstein, his wife, both long since dead. I lived many years in the same building with Andreas Hauenstein, senior, and I knew all his children perfectly well. These children were: 1st, Andreas Hauenstein, and John Hauenstein, recently declared dead by a decree of the court of Zurzach; 3d, Henry Hauenstein; 4th, Anna Hauenstein; 5th, Solomon Hauenstein, deceased; 6th, Louisa Hauenstein, and one other sister, Marie Hauenstein, who died unmarried. Louisa Hauenstein married Gottlieb Krattiger, and had one child by him, named also Louisa Krattiger. The persons whom I have just mentioned as being children of Andreas Hauenstein, senior, were known to all the citizens of Unterendingen, who looked upon them as children of the said Hauenstein, and was so treated by them and by the parents. I am no relation to the parties interested in this suit.

(Signed in a foreign language unintelligible to me.—A. S.)

U. S. CONSULATE.
Zurich, Switzerland, May 3d, 1876.

I, S. H. M. Byers, U. S. consul at Zurich, and commissioned to take depositions by the circuit court of Richmond, Va., as shown by the commission hereto attached, do hereby certify that each of the witnesses, Anna Hauenstein, Henry Hauenstein, Louisa Krattiger, Frederick Hauenstein, Johan Hauenstein, and Jacob Hauenstein appeared before me at my office on the first day of May, 1876, between the hours of 6 a. m. and 6 p. m., and being duly sworn, deposed as set forth in the foregoing depositions, which they signed in my presence. Neither the defendant nor his counsel appeared at the time the depositions were taken. The depositions were written down by me. I have no interest in this suit.

[SEAL.] S. H. M. BYERS,
U. S. Consul Commissioned to take Depositions.

The letters referred to in the foregoing depositions, marked A, B, C, D, and E, are in foreign language and unintelligible to me, and not copied in the record by direction of pl'ts' counsel.

A. SHIELD, *Clk.*

The deposition of John Hitz, taken on the sixth day of June, 1876, and filed in the clerk's office on the 16th day of June, 1876:

22 *Deposition of John Hitz.*

JOHN HITZ, being first duly sworn, deposes and says:

1st question. What is your age and business?

Answer. I am forty-seven years of age; I am the consul-general for the Republic of Switzerland in the United States of America.

2d question. By the laws of the Canton Aargan, Switzerland, who are the heirs of a man who dies intestate, having never been married, having no father or mother nor children, but leaving brothers and sisters?

Answer. According to the laws of the Canton of Aargan, Switzerland, the heirs of a man who dies intestate, having never been married, leaving no father or mother nor children, are his brothers and sisters, if he have such.

3d question. What is the effect under the laws of Switzerland of a decree of a court that a man is dead in the eyes of the law; does it give his heirs the right to take possession of his estate?

Answer. Under said laws a decree of a court gives the heirs of a man who is dead in the eyes of the law the right to take possession of his estate.

4th question. Can citizens of the State of Virginia, in the United States, inherit real estate under the laws of the Canton of Aargan?

Answer. Yes.

5th question. What is the effect under the laws of the Canton of Aargan, Switzerland, of the appointment of a guardian of an absent person by the district court?

Answer. Under said laws the appointment by the district court of a guardian for an absent person gives the guardian authority to take possession of his ward's estate, and hold and dispose of the same under the supervision of the orphans' court.

And further this deponent saith not.

JOHN HITZ.

DISTRICT OF COLUMBIA, *ss:*

I, James S. Edwards, a notary public in and for the District of Columbia, do hereby certify that the foregoing deposition was duly taken, sworn to and subscribed before me at the time and place mentioned therein. That no counsel was present to represent either party, and that the questions were put to the witness by myself.

Given under my hand and notarial seal this sixth day of June, 1876.

[NOTARIAL SEAL.] JAS. S. EDWARDS,
Notary Public.

23 *Affidavit of John Hitz.*

STATE OF PENNSYLVANIA,
City and Co. of Philadelphia, ss:

Be it remembered that on this 8th day of July, A. D. 1876, before me, a notary public for the Commonwealth of Pennsylvania, residing at Philadelphia, personally appeared John Hitz, consul-general for the Republic of Switzerland in the United States, who, being duly sworn, deposes and says that on or about the 26th day of June, A. D. 1876, he requested the War Department of the Government of the United States, through the Adjutant-General thereof, to furnish him with a copy of the muster-rolls on file in his said office of Company A, 1st Regiment of Virginia Mexican Volunteers, and that the said Adjutant General refused to furnish the same on the ground that the rules of the department did not permit it, and that said copies were for the plaintiffs as evidence in the suit now pending in the circuit court of the city of Richmond, Virginia, under the style of Huenstein vs. Lynham, escheator, &c.

JOHN HITZ.

Given under my hand and seal this eighth day of July, A. D. 1876.

[NOTARIAL SEAL.] GEO. W. THURSTON,
Notary Public.

Certificate of the Secretary of War.

UNITED STATES OF AMERICA:

WAR DEPARTMENT,
Washington City, June 30, 1876.

Pursuant to section 882 of the Revised Statutes, I hereby certify that the name of Solomon Hauenstein is not borne on any of the company rolls of the First Regiment Virginia (Mexican war) Volunteers, for the months of January and February, September and October, one thousand eight hundred and forty-seven, or the muster-out rolls of said companies, as shown by the records in this department.

In witness whereof I have hereunto set my hand and caused the seal of the War Department to be affixed on the day and year first above written.

[SEAL.]

J. D. CAMERON,
Secretary of War.

24 The deposition of Robert C. Donnan, taken on the 3d day of July, 1876, on behalf of the plaintiffs, and filed on the 4th day of July, 1876.

Deposition of Robert C. Donnan.

ROBERT C. DONNAN, a witness on behalf of the plaintiffs, having been first duly sworn, deposes and says:

1st question by plaintiffs' attorney. What is your age, place of residence, and occupation?

Answer. I am in my fiftieth year; reside in the city of Petersburg; my occupation is collector of debts.

2nd question by same. State whether or not you were a volunteer in the Mexican war; if yea, to what company and regiment did you belong?

Answer. I was a volunteer in the Mexican war, and belonged to Company A, First Virginia Regiment; the company was commanded by Capt. R. G. Scott, jr. I was 2nd jr. lieutenant of said company.

3d question by same. Did you or not know any person connected with said company and regiment by the name of Solomon Haunstein?

Answer. I did not.

4th question by same. If such a person had belonged to that company, would you now remember his name?

Answer. I think I should; I believe I should remember the name of every man in the company should his name be called.

Cross-examined:

1st question by J. A. Lynham, for Commonwealth of Virginia. For how long a time were you with Co. A, First Va. Regiment, in the Mexican war, and for what time were you absent from the company on furlough or otherwise?

Answer. I was never absent from the company on furlough. I left the city of Richmond with the company on the 25th day of December, 1846, and remained with the company until I resigned and returned home. Lt. Fry and myself returned home together, but I can't recollect the time of my resignation and return home.

2nd question by same. Did you associate with the privates of that company in such manner as now, at this late date, to say positively or recall distinctly each and every private of that company?

Answer. I associated with the privates a great deal, and while I can't recall distinctly the name of each and every private of that company, yet if the name of the privates are mentioned, I think I can recall their names.

3d question by same. Major Poe (a private) says S. Hauenstein was in Mexico with you all; do you mean to swear positively that he was not there in your company?

Answer. I have no recollection of such a man, and to the best of my knowledge and belief he was not a member of my company.

4th question by same. Do you remember a German in that company called "Swiss" or "Sweede"; if so, who was that "Swiss"?

Answer. I have no recollection of such a man.

5th question by same. May not this Swiss, Hauenstein, have been there and you not able now to recall or recollect it?

Answer. As before stated, I have no recollection whatever of any member of the company by the name of Hauenstein; it is possible that there might have been such a man, but I think I can remember the name of every member of the company when it is mentioned to me.

And further this deponent saith not.

R. C. DONNAN.

STATE OF VIRGINIA,
City of Petersburg, to wit:

I, John Mann, a notary public in and for the said city, in the State aforesaid, do hereby certify that the foregoing deposition of Robert C. Donnan was duly taken, subscribed, and sworn to before me at the time and place mentioned in the caption thereto.

Given under my hand this 3d day of July, 1876.

JOHN MANN,
Notary Public.

The deposition of John J. Fry, taken on the 6th day of July, 1876, and filed on the 7th day of July, 1876.

Deposition of John J. Fry.

1st question. Where do you live; what is your age?

Answer. I live in Albemarele County, and am fifty-two years of age.

2 question. State whether or not you were an officer in Co. A., 1st Va. Vols., Capt. Scott commanding, in 1847; and, if so, were you with that company in Mexico, and, if so, how long?

Answer. I was an officer in that company, 2nd lieutenant; I was with the company ten or eleven months in Mexico; I went out with the company, but returned home before they did.

3d question. Did you know all the men in that company?

Answer. I did not know them all when the company was organized; I knew every man while I was with them.

4th question. Do you recollect any man in the company named Solomon Hauensten?

Answer. I do not now recollect any may in the company of that name, although there may have been such a man. It has been so long since I was with the company that I have forgotten the names of a good many of the men; if I could see their faces I would know them still.

Cross-examined on behalf of the defendant:

1st question. Did you, as an officer, associate to that extent with the

privates of your company in Mexico, so as to be able now to recall and state positively all that were there?

Answer. I had some particular friends in the company with whom I associated more than with the rest of the men; I associated with the others to such an extent that I knew them then, but not to such an extent that I can recall them all now.

2 question. Do you mean to swear positively that Solomon Hauenstein was not in your company then?

Answer. I do not; if he was a member of the company, his name was on the pay-roll; this, I suppose, can be found in the Adjutant-General's office in Washington, and will be the best evidence of the fact.

3d question. Do you remember a man of said company called by the name of "Swiss"; if so, who was this "Swiss"?

Answer. I have a faint recollection of some one in the company being called "Swiss," but I cannot remember to whom the name applied.

4th question. Could not Hauenstein, under that other name, have been there and you not now remember or know of it?

Ans'r. Certainly he could.

And further this deponent saith not.

JNO. J. FRY.

STATE OF VIRGINIA,
Albemarle County, to wit:

I, Frederick W. Page, a justice of the peace for the county aforesaid, do certify that the foregoing deposition was duly taken, sworn to, and subscribed at the time and place mentioned therein before me.

FREDERICK W. PAGE, *J. P.*

27 The depositions of Emanuel Francis and others, taken by consent of parties by counsel, and filed on the 6th day of July, 1876; the date of taking the same does not appear.

Deposition of Emanuel Francis.

EMANUEL FRANCIS, a witness of lawful age, being first duly sworn upon the Evangelists of Almighty God, deposeth and saith as follows:

1st question by Wm. S. Royall. What is your name, age, and residence, and business?

Answer. My name is Emanuel Francis; am in my forty-third year, and reside partly in Ashland; I am a shoemaker by trade.

2nd question by same. Can you read and write?

Answer. I can, sir.

3rd question by same. Did you know the late Solomon Hauenstein, who resided in Richmond?

Answer. I did, sir.

4th question by same. Since when did you know him?

Answer. I knew him when he first came here; I think it was about the time of the Mexican war.

5th question by same. Did you know him intimately?

Answer. I did, sir; I knew him intimately up to the time of his death, which happened in 1861, I think, because I joined the army in March, 1862, and he was dead before that time.

6th question by same. Was he a married man?

Answer. No, sir; not that I ever heard of.

7th question by same. You speak of his coming here; of what nation was he supposed to be?

Answer. He was supposed to come from Switzerland; he went by the name of "Swiss."

8th question by same. State whether or not he was almost exclusively called "Swiss."

Answer. He went by that name entirely.

9th question by same. What was his business?

Answer. He was a shoemaker when he came here; he worked at that business a number of years, until he went away from here; he was gone a number of years, and when he returned he told us that he been to California; when he returned he went into the restaurant business, which he continued in until his death.

10th question by same. Were you familiar with his handwriting?

Answer. I was, sir.

11th question by same. Look at the letters now shewn you, marked A, B, C, D, and E, attached to the depositions of Anna Hauenstein, Henry Hauenstein, Frederick Hauenstein, John Hauenstein, Jacob Hauenstein, and Louisa Krattiger, and say whether or not you think they are in his handwriting.

28 Answer. I can't tell anything about the writing, because it is in characters and a language I don't understand. I think the signature to the letter dated 1859 is in his handwriting; the signature to the letter dated 1848 I can't say about; I never saw him make an "H" like the one in that Hauenstein. There is an address on that letter in the following words: "Solomon Hauenstein, Richmond, Virginia, North America, United States," which I think is in his handwriting. There is an "e" in all the signatures to these letters; the first "e" in the name Hauenstein, which I never saw put in any of his signatures. When I was a witness in the cases of the Commonwealth vs. Cahoon, on trial for forging Solomon Hauenstein's signature, a book was showed to me which they said was a Mason's book, in which his name was written with that "e" in it.

12th question by same. Did you think that that signature in the book was Solomon Hauenstein's?

Answer. I did, sir.

13th question by same. Were you positive about it?

Answer. I was, sir.

14th question by same. Is there any other writing on the letters referred to above that looks to you like the writing of Solomon Hauenstein?

Answer. The word "Richmond" in the letter dated in 1859, the direction of the letter dated in 1848, the direction of the letter dated in 1847, look like his. I don't think there is any doubt about the "Hs" in the letters dated in 1848 and 1847 being his. I want to say here that I never saw him write his name "Solomon" in my life; he always signed his name "S. Hauenstein," without the "e." I never saw his name written "Solomon" until on the trial of Cahoon or Sands; they showed me the bond which was said to be forged, to which the name was signed "Solomon Hauenstein," without the "e"

15th question by same. Did you recognize the signature of that bond as a forgery?

Answer. I didn't think that Hauenstein wrote it.

16th question by same. Do you know whether or not Cahoon and Sands were convicted on this trial?

Answer. They were.

17th question by same. Have you examined recently signatures of Hauenstein, now in the record of those trials, which you were satisfied at the time of the trials were genuine?

Answer. I have examined them to-day.

18th question by same. Do you know about what time Hauenstein built his houses in the city of Richmond on New street?

Answer. In 1858 or 1859.

29 Cross-examined by John A. Lynham, counsel for the commonwealth:

1st question. Do I understand you to identify in positive manner the caption and signature to these various letters as the handwriting of Solomon Hauenstein, deceased, or is it a mere inference on your part?

Answer. I can't swear that he signed the letter of July 8th, 1848. It looks very much like his writing, but I never saw him make an "H" or "e" either like them.

2d question by same. Can you, under oath, identify the letter of July 12th, 1847, as that signed by Hauenstein?

Answer. No, sir, I cannot.

3rd question by same. In reference to the caption and signature of letter July 19th, 1846, will you undertake to positively state that that caption and signature is wholly in the handwriting of Hauenstein, deceased?

Answer. I cannot, sir.

4th question by same. In reference to the letter of February, 1846, wherein do you positively identify the handwriting of said Hauenstein?

Answer. In the direction; to the best of my knowledge, I think is in his handwriting.

5th question by same. Do I understand you then as identifying the caption and signature to the letter of March, 1859, as the signature of said Hauenstein?

Answer. Yes, sir.

6th question by same. In what instance did you ever before know of said Hauenstein signing his name "Hauenstein" as signed there?

Answer. I never saw him sign his name with the "e" as signed there.

7th question by same. Such being the case, how do you positively identify that signature as his own?

Answer. I think the letter "H" and "a."

8th question by same. Don't it appear to you that the handwriting to this said letter differs very widely from the others?

Answer. Yes, sir; he was working at shoemaking when the others were written. Every shoemaker I ever saw writes a cramped-up hand.

9th question by same. As I understand, you were intimately acquainted with this Mr. Hauenstein and lived next to him at the time of his death; did you ever hear him speak of these alleged brothers and sisters?

Answer. No, sir, I never did.

And further this witness saith not.

EMANUEL FRANCIS.

30 *Deposition of B. Hassel.*

B. HASSEL, being duly sworn, deposeth and saith as follows:

1st question by Wm. L. Royall, counsel for Hauensteins. What is your name, age, and residence?

Answer. B. Hassel; my age is forty-seven, and I reside in Richmond.

2nd question by same. To what nationality do you belong?

Answer. I am a German by birth.

3rd question by same. How long since you emigrated from Germany?

Answer. I emigrated in 1849.

4th question by same. What is your business here?

Answer. Editor and publisher of a German paper.

5th question by same. Look at the letters now *you* shown you, marked A, B, C, D, and E, attached to the depositions of Anna Hauenstein, Henry Hauenstein, Frederick Hauenstein, John Hauenstein, Jacob Hauenstein, and Louisa Krattiger, and say in what language they are written?

Answer. They are all written in German text, except that part of them in English.

6th. State whether or not you think from the inspection of them that they were all five written by the same hand.

Answer. I am almost sure that they were written by the same hand; the German letter "W" is written in a peculiar way in all the letters, never seen by me before.

7th question by same. Is the manner of writing the "W" a very peculiar one?

Answer. Yes, sir; I have never seen it written so before.

8th question by same. Do you find that letter in each one of the letters?

Answer. Yes, sir; in every one of them.

9th question by same. Have you made a written translation into English of those five letters?

Answer. Yes, sir; and I file herewith a written translation of each, marked A, B, C, D, and E, which are in the words and figures following, to wit:

A.

RICHMOND, 21 *Feb'ry*, 1846.

DEAR BROTHER: The letter you wrote to brother I received and was very glad to hear that all are well, and I am thankful for all the love and kindness you have shewn to us all. You ask for $120; you certainly 31 would have had the money long ago if I had received your letter sooner. Dear brothers and sisters, don't think that I intend to cheat*e* you, even if I am the youngest. Hear what I have to write to you; every word which I write to you shall be the truth, and so you will find me in future. Herewith you find the *prove* which I promised to you, and you ought to be satisfied that I do what is in my power. The paper which you find in this letter is a check for 10 pounds sterling in money, or $50 American dollars. Dear brother, as soon as you receive this letter take the check and go to a broker or a large merchant in Zurzach, or in Crapp, or in Zurich, or in Aargan; ask also M. Seifensieder or M. Frauenstein for advice, but don't give the check out of your hands, and go and get the money yourself. As soon as you receive the money for it write to me immediately, or if you can't get the money for it send it back to me in a letter, but don't lose *no* minute. Dear brother Henry, you know well enough that you can't write my address; go to a penman in Zurzach; let him write every single letter of my address which you find in this letter; you know it is in English and not in German. Good-bye; I hope to see you all soon in this country. My address is Solomon Hauenstein, Richmond, Va., North America.

The check is English.

B.

RICHMOND, *July 19th*, 1846.

DEAR BROTHER: Your first letter I received on the last day of March,

and the last one on July the 14th, in which I received the glad news that the money arrived, but I don't believe that you got the full worth of the money; the merchant said that it would bring a premium in Switzerland; either me or you was fooled; anyhow we can't be cheated much.

Dear brother, I wish it was in my power to help every one of you; should one or the other need my help you are always welcome to it, if it should be in my power.

Dear brothers and sisters, I would be very glad to see you once more, either here or in the old country. Dear brothers and sisters, I wish I was with you all again, rather in the old home than here. Dear Henry, I could send you every year from 300 to 400 florins, if I had paying work, that you could buy property over there so we all could live happly together; but there some big scoundrels over there, which I don't want to see any more; but let the devil come after them to-day, I will be with you to-morrow. Dear brothers and sisters, you must not believe that money can be found in the streets here. No; you have to work here for it just as well as over there; persons who don't work here or there won't make anything. I received a letter on the 24th of January,
32 from our brother Andreas; he would be glad to see every one of you all over here; but he didn't mention to help you all to come over. No; but he wanted thirty dollars from me. I treated him like he treated me at home.

Every one who have been kind to me I will be kind to them; altho' it is not in my power at this moment; that you all know. It took me two years to learn my trade; the third year I did not make more as $100, for which I bought clothes. You must know that clothes are very dear in this country. Andrew wrote that he had bread for one more, but work too.

Dear brothers and sisters, I don't advise no one to come to this country; everybody can do as they choose. If Jacob like to go to him let me know; I will help him if Andrew is willing to assist me; it is too hard for me alone; 1,000 good wishes and my *my* love to all.

S. HAUENSTEIN.

C.

RICHMOND, *July 12th*, 1847.

DEAR BROTHER: Your letter of November 4th, 1846, came to hand. It made me happy to see that the feelings towards me are the same as ever. It would be very good if a constant correspondence could be kept up between us until it is God's will that we will meet again. I let you know that my health is very good now, and that I am more satisfied in this free country than ever before in my life. My dearest brothers and sisters, it was my intention long and long ago to visit you in our old city, Unterendingen, but always in vain; it gives me too much trouble to write you the particulars now.

DECEMBER 13TH, 1846.

I received the last letter from brother Andrew, where he wrote me about the death of his wife, and her sickness, and that he is all alone in this world again. At the same time he asked me for $20; $20 won't do him any good, and for this reason I did not send them. Dearest brothers and sisters, since my arrival in this country I enjoyed very good health, until last winter I took a severe cold, which settled on my breast,

and I suffer from it sometimes yet. I want to give up the shoemaker business and open a store, by which I will do a great deal better.

Dear Jacob, when Andrew wrote to me, in 1845, that he had bread enough for you, and could make very good use of you, I wrote right away to send me 25 dollars, and I would add the same and send you the 50 dollars for your travelling expenses. I did receive two letters from him since, in which he did not mention that letter I wrote to him, but asked me for money, but never mentioned that he received my letter, but he asked me for money again; he has lost all help from my side, on account that he has shown no kindness to you all. I have
33 to end my letter now. Dear Henry, write as soon as possible, and let me know all the particulars of the family. Send my love to all my friends.

Dear Jacob, be content; if you have no friend in Europe, you will always have one in America, your youngest brother, for whom you have suffered so much, as well as Henry.

S. HAUENSTEIN.

D.

JULY 3D, 1848.

DEAR BROTHER: At last I received your letter of the June 26th, 1848; that's the first letter since October 18th, 1846.

I was very much surprised about what you wrote, and can't understand it at all. You write that I should not deceive you. In what should I deceive you, I like to know myself. You never wrote me that I owed you anything; if you did I would have paid it long ago. I am most sure that I made no promises in all my letters; why should I deceive you? Dear brother, if I promise anything I always stick to it like a man. I believe I write plain enough, so everybody can understand it.

I always wrote you what I could do, and not what I would do, and if you read the letters again you will find out that there is no promise in it; read them over good, so you don't deceive yourself and insult me.

Dear brother, I am waiting impatiently for an answer; I like to know how I could deceive you. My feelings and my love for you all are yet the same as I stated in my last letter.

Dear brother, I hope we won't have any falling out. My brother, the ties of relationship will be sacred as ever; we shall always be brothers, and even separated, our love to each other can't be crushed.

I live in the city of Richmond now; I am not very well, and I believe I will make a trip to South America next fall. The climate is not very healthy in Richmond. I can't write you any news from acquaintances, because I have not seen any of them; I don't believe I spoke five German words in the last three years. I have to close now, and wish you all good health. My love to all, and all my friends that enquire about me, and especially M. Kircheapfleger.

S. HAUENSTEIN,
Richmond, Virginia, North America.

Or, Solomon Hauenstein, Richmond, Virginia, North America, United States.

34 E.

RICHMOND, *March 18th*, '59.

DEAR BROTHER: I have to write you once again; I have to ask you to forgive me for the carelessness I have shown. And then in

your last letter you told me that you had to pay 19 cents postage; that was the reason I would not write any more; every letter costs me 30 cents as far as I can prepay them. Any scholar can understand this.

Dear brother, I promised you often to come home, but I never could give up business yet, and can't come yet, because I am building five houses now, which will bring me $500 rent. These houses cost me $5,000 to build. Dear brother, if I have good luck, and my health will allow it, I will come next year to see you. I am yet in the same business, but the times is very hard in America now; they are bound to change soon. I could write you a great many news, but I have no time now.

I let you know that I am not married yet, and write me how all my brothers and sisters are, and also your family.

I am tolerably well, and hope that this will find you and your family the same. My best wishes to all.

Your dear brother,

S. HAUENSTEIN,
Richmond, Va.

10th question by same. Are you sure that those translations are correct?

Answer. They are correct to the best of my ability to render in English. I am not so well acquainted with the English as with the German.

Cross-examined by JOHN A. LYNHAM, counsel for the commonwealth:

1st question. Your only test about these letters seems to be in the use of the letter "W;" will you please say whether letter "W" commencing letter of February, 1846, and also letter "W" commencing July, 1846, and also letter "W" in the body of the letter 1859, are made in the same manner?

Answer. I referred only to the small letter "W" written in German, and not to the English "W." The English "W" in those two letters looks changed.

2d question by same. Look at the German word in the third paragraph of the letter of 1859, and the same word in the letter of July 3rd, 1848, which, translated, means to understand, and say if, in your opinion, they were written by the same hand?

Answer. In my opinion they are.

3rd question by same. As an expert in the matter of these letters, please say if the caption and the signatures to the respective letters of 1859 and 1848 were in the same handwriting.

(This question is excepted to by counsel for Hauenstein, for the reason that the witness being a German, and the writing referred to being in English, he cannot, in the nature of things, give the best evidence in answer to that question.)

Answer. I think they are written by the same hand, which still is more conclusive to me, as the signature of letters "A" "B" "C" is most the same. The letter "E" was written eleven years later, and the writer could have changed the mode of his signature, but the German text in all the letters is most alike. The letter "E" only proves that the writer was more used to writing. This accounts to me for the difference of the letters.

Re-examined by WM. L. ROYALL, counsel for the Hauensteins:

1st question. I understand you to say that this peculiar letter "W" occurs in all the letters, the letter dated in 1859 as well as the others; will you state how many times you find it in the letter dated in 1859?

Answer. I find it ten times.

2nd question by same. Please write in this deposition yourself the usual way of writing the German letter "W," and, as well as you can, an imitation of the way in which you find it written in these.

N. B.—The witness here wrote as follows:

The German letter is written ; in the letter it is always written thus .

(For these characters see MSS. of record.)

G. M. D., *N. P.*

3rd question by same. Do you think any other German ever wrote this letter in this way?

Answer. I have already stated that I never saw it before; only by the full word that I could understand the meaning of this letter.

36 4th question by same. Did you ever hear of the German letter "W" being written in this way anywhere else?

(Objected to by counsel for commonwealth as illegal.)

Answer. No, sir.

And further this deponent saith not.

B. HASSEL.

Deposition of Charles Euker.

CHARLES EUKER, being duly sworn, deposeth and saith as follows:

1st question by Wm. L. Royall, counsel for plaintiffs. What is your name, age, and residence?

Answer. Charles Euker; I am thirty-five years old, and reside in Virginia.

2nd question by same. From what country do you come?

Answer. From Germany.

3rd question by same. Look at the letters now shewn you marked A, B, C, D, and E, filed with the depositions of the Hauensteins taken in Switzerland, and say if you observe any peculiarity in those letters in the way of writing the German letter "W."

Answer. Yes, I do; I never saw it written anywhere else in that way.

4th question by same. Do you find it written in the same way in all these letters?

Answer. I do, with the exception when he makes an English "W"; but that same way of writing the German "W" is in all five letters.

5th question by same. Be good enough to give to the notary in English the decree which accompanies the depositions of the Hauensteins, taken by S. H. M. Byers in Switzerland.

Answer. It reads: "Copy out of the records of the district court of Zurzach the 15th day of January, 1873, on account of the brothers John and Andreas Hauenstein, of Bachelis, from Unterendingen, who emigrated in May, 1840, and over whom and their lives no positive knowledge has come to this court, and we hereby declare them, after it has been published three times in the court paper, as dead.

This is a correct copy.

Clerk's office.

GROSS,
Court Clerk.

And further this deponent saith not.

CHARLES EUKER.

37 *Deposition of John A. Lynham.*

JOHN A. LYNHAM, being duly sworn upon the Holy Evangelists of Almighty God, deposeth and saith as follows:

1st question by William L. Royall, counsel for Hauensteins. Look at the deeds now shown to you and filed as a part of your deposition, marked J. A. L., No. 1; J. A. L., No. 2; and J. A. L., No. 3, being deeds made, the one on the 5th day of April, 1858, by George W. Barker and Anderson E. Tucker and wife to Solomon Hauenstein; another, made the 16th day of September, 1856, by William N. Adams and wife to Solomon Hauenstein, and the third made on the 6th day of November, 1856, by Humphrey H. Miles and wife to Solomon Hauenstein, which, as escheator for the commonwealth, you have recently sold, a report of which you have made in this cause, the circuit court.

Answer. So far as I am at present advised, the property mentioned in those deeds is the identical property known as the said Hauenstein estate, which is the subject of this litigation as well as the subject of my sale as escheator. This I verily believe to be so, as I had those copies made myself as evidence of Hauenstein's title in the ejectment suits I brought for the commonwealth in the circuit court of Richmond. For the purposes of these ejectment suits I also had a plat and survey of this property made by Mr. Jos. J. Pleasants, surveyor (which I will produce on the argument of this cause), and by metes and bounds and abstract of title accompanying, will, I think, undoubtedly locate the fact that it is the very property now here in question; a copy of which I file with the deposition. The property covered by the two deeds made in 1856 brought the gross sum of $2,900.60; the property covered by the deed made in 1858 (embracing a single house) brought the gross sum of $517.50 (five hundred and seventeen dollars and fifty cents).

2d question by same. Did the plaintiffs in this suit unite with you in the sale made?

To quiet any apprehension that might exist in the minds of the bidders at the time of my sale I stated to them, by the express authority of Mr. Royall, that his clients would assert no claim to the realty I was selling, but fully joined and united with me, remanding all their claim to the fund coming into court. And furthermore I said at the same time that their uniting with me was wholly unnecessary (but mentioned it simply for what it was worth), for the reason that the courts had decided that the legal title was alone in the commonwealth.

J. A. LYNHAM.

Adjourned, by consent, to 5th day of July.

38 The following are copies of Exhibit J. A. L., No. 1, J. A. L., No. 2, and J. A. L., No. 3, referred to in the deposition of John A. Lynham:

Exhibit J. A. L., No. 1.

This deed, made this 5th day of April, in the year one thousand eight hundred and fifty-eight, between Geo. W. Barker, of the one part, Andrew E. Tucker and Lucy his wife, of the county of Henrico, of the second, and Solomon Hauenstein, of the city of Richmond, of the third part: Whereas the said Anderson E. Tucker did make to George W. Barker a deed of trust, bearing date the 26th of March, 1857, to secure the payment of a certain bond for six hundred and fifty dollars, bearing even

date with said deed, and payable twelve months after date, and made payable to the said Solomon Hauenstein; the said bond having become due, the said Andrew E. Tucker, wishing to pay the said bond, conveys to the said Solomon Hauenstein the following property: Now, therefore, in consideration thereof, the said Geo. W. Barker, of the one part, Anderson E. Tucker and Lucy, his wife, of the other, do grant unto the said Solomon Hauenstein (the said Geo. W. Barker with special and the said Andrew E. Tucker and Lucy, his wife, with general warranty) all that certain lot, piece, or parcel of land lying and being in the county of Henrico, near the city of Richmond, fronting forty-two feet and two-thirds of a foot on the western side of Adams street, and running back one hundred and fifty (150) feet, more or less, to a twenty-feet alley, being the same real estate conveyed to the said Anderson E. Tucker by Wm. G. Brook and wife by deed dated the 26th of March, 1857, and duly recorded, also the trust deed to said G. W. Barker in Henrico County court clerk's office. The above-described lot of land is bounded on the north by the property of John McGinnis, and on the south by the property of Thos. W. Piers. The said parties of the second part covenant that they have the right to convey the said land to the grantee; that they *done* no act to encumber the said land; that the grantee shall have quiet possession of the said land free from all incumbrances, and that they, the said parties of the second will execute such further assurance of the said land as may be requisite.

Witness the following signatures and seals:

GEO. W. BARKER. [SEAL.]

his
ANDERSON X E. TUCKER. [SEAL.]
mark.

LUCY TUCKER. [SEAL.]

39 This deed was acknowledged in the clerk's office of Henrico County court on the 14th day of April, 1858, by George W. Barker and Anderson E. Tucker, parties thereto; and Lucy Tucker, wife of the said Anderson E. Tucker, personally appeared before me in the office aforesaid, on the same day, and being examined by me privily and apart from her said husband, and having the deed aforesaid fully explained to her, acknowledged the same to be her act, and declared that she had willingly executed the same and wished not to retract it; and thereupon said deed was admitted to record.

Teste:

WM. FOLKES, *C. H. C.*

Copy.—Teste:

SAM'L J. ANABLE, *C. H. C.*

Exhibit J. A. L., No. 2.—Filed with deposition of J. A. Lynham.

This deed, made this sixth day of November, in the year 1856, between Humphrey H. Miles and Virginia N., his wife, of the county of Henrico, parties of the first part, and Solomon Hauenstein, of the city of Richmond, of the second part, witnesseth, that in consideration of the sum of two hundred dollars, the said parties of the first part do grant unto the said Solomon Hauenstein, with general warranty, all that certain lot, piece or parcel of land lying and being in the county of Henrico, and bounded as follows, to wit: commencing on the south side of Short street at the distance of fifty-three feet from its intersection with the southeast corner of Adams street, fronting on said Short

street twenty-six feet, and running back southerly and parallel with Adams street, and between parallel lines, one hundred and thirty-two feet, being a part of square No. 226½ in the plan of Adams' division; the lot of land hereby granted being the same conveyed by Alice T. Tignor to Isbell and Carter by deed dated 1st October, 1852; by Isbell and Carter and their wives conveyed to R. D. Mitchell, trustee for Virginia Wood, by deed dated 11th February, 1853; by said Mitchell, trustee, and Virginia Wood conveyed to Wm. Mitchell by deed dated 25 April, 1855; and by said Wm. Mitchell conveyed to A. B. Hutcheson by deed dated 1st August, 1855, and by said A. B. Hutcheson conveyed to Humphrey H. Miles by deed dated 29th August, 1855; all of which deeds are recorded in the office of the clerk of Henrico County court.

The said Humphrey H. Miles covenants that he has the right to convey the said land to the grantee; that he has done no act to encumber the said land; that the grantee shall have quiet possession of the said land free from all incumbrances, and that the parties of the first
40 part will execute such further assurance of the said land as may be requisite.

Witness the following signatures and seals:

HUMPHREY H. MILES. [SEAL.]
VIRGINIA N. MILES. [SEAL.]

STATE OF VIRGINIA,
County of Henrico, to wit:

I, William Christian, a notary public for the county aforesaid, in the State of Virginia, do certify that Humphrey H. Miles, whose name is signed to the writing above, bearing date on the 6th day of November, 1856, has acknowledged the same before me in my county aforesaid.

Given under my hand this 7th day of November, 1856.

WM. CHRISTIAN, *N. P.*

STATE OF VIRGINIA,
County of Henrico, to wit:

I, William Christian, a notary public for the county of Henrico, in the State of Virginia, do certify that Virginia N., the wife of Humphrey H. Miles, whose names are signed to the writing above, bearing date on the 6th day of November, 1856, personally appeared before me in the county aforesaid, and being examined by me privily and apart from her husband, and having the writing aforesaid fully explained to her, she, the said Virginia N. Miles, acknowledged the said writing to be her act, and declared that she had willingly executed the same and does not wish to retract it.

Given under my hand this 7th day of November, 1856.

WM. CHRISTIAN, *N. P.*

This deed was presented in the clerk's office of Henrico County court on the 7th day of November, 1856, and, with the certificates thereon, admitted to record.

Teste:

JOHN N. HARRISON, *C. H. C.*

Copy.—Teste:

SAMUEL J. ANABLE, *C. H. C.*

Exhibit J. A. L., No. 3.—Filed with deposition of John A. Lynham.

This deed, made this sixteenth day of September, in the year one thousand eight hundred and fifty-six, between William N. Adams and
41 Ellen his wife, of the county of Henrico, of the first part, and Solomon Hauenstein, of the city of Richmond, of the second

part, witnesseth, that in consideration of the sum of four hundred and fifty dollars, the said party of the first part doth grant unto the said Solomon Hauenstein, with general warranty, all that lot of land lying in the county of Henrico, near the city of Richmond, fronting fifty-three feet on the south side of Short street, and running back one hundred and twenty-five feet, being a part of square number 226½ in Adams' plan of division, and designated as follows: Beginning at the south-eastern corner of Short and Adams streets, and running along the eastern line of Adams street 125 feet in a southerly direction; thence eas'wardly fifty-three feet in a line parallel with Short street; thence northwardly 125 feet, parallel with Adams street to Short street; thence westwardly along the south side of Short street, fifty-three feet to the corner of Adams street, the point of beginning; the said lot being a portion of the real estate conveyed to said Adams by Alfred Inloes by deed the sixth day of April, 1854, and duly recorded in Henrico County court.

The said William N. Adams covenants that he has the right to convey the said land to the grantee; that he has done no act to encumber the said land; that the grantee shall have quiet possession of the said land free from all incumbrances, and that the said parties of the first part will execute such further assurance of the said land as may be requisite.

Witness the following signatures and seals.

WILLIAM N. ADAMS. [L. S.]
ELLEN ADAMS. [L. S.]

STATE OF VIRGINIA,
County of Henrico, to wit:

I, William Christian, a notary public for the county aforesaid, in the State of Virginia, do certify that William N. Adams, whose name is signed to the writing hereto annexed, bearing date on the sixteenth day *day* of September, has acknowledged the same before me in my county aforesaid.

Given under my hand this 10th day of September, 1856.

WILLIAM CHRISTIAN, *N. P.*

STATE OF VIRGINIA,
County of Henrico, to wit:

I, William Christian, a notary public for the county of Henrico, in the State of Virginia, do certify that Ellen, the wife of William N. Adams, whose names are signed to the writing hereto annexed,
42 bearing date on the sixteenth day of September, 1856, personally appeared before me in the county aforesaid, and being examined by me privily and apart from her husband, and having the writing aforesaid fully explained to her, she, the said Ellen Adams, acknowledged the said writing to be her act, and declared that she had willingly executed the same, and does not wish to retract it.

Given under my hand this 16th day of September, 1856.

WILLIAM CHRISTIAN, *N. P.*

This deed was presented in the clerk's office of Henrico county court on the 17th day of September, 1856, and with the certificates thereon admitted to record.

Teste: JOHN N. HARRISON, *C. H. C.*
A copy—Teste: SAMUEL J. ANABLE, *C. H. C.*

Deposition of Richard Lee.

RICHARD LEE, being duly sworn, deposeth and saith as follows:

1st question by William L. Royall, counsel for Hauensteins. What is your name, age, and place of residence?

Answer. My name is Richard Lee; my age fifty-three years, and my residence in the city of Richmond.

2d question by same. What is your business?

Answer. Cordwainer by trade, what the people call shoemaker.

3rd question by same. Did you know the late Solomon Hauenstein, who is supposed to have committed suicide in Richmond in the year 1861 or 1862?

Answer. Yes, sir; I did.

4th question by same. Did you know him well?

Answer. Yes, sir.

5th question by same. State as nearly as you can, about the time when you' acquaintance with him began.

Answer. I should say between 1844 and 1846; when I first knew him he could speak very little English, but he learned English very rapidly.

6th question by same. State whether or not he boarded at your house.

Answer. Yes, sir, he did; he boarded in my house from the time I first knew him until he went to California, except for a short time, when he left my house and went to board at the corner of 18th and
43 Franklin, and then he came back to my house and remained until he went to California, and when he came back from California, he came back to my house to board again.

7th question by same. About how long do you suppose he was boarding at the corner of 18th and Franklin?

Answer. About six months, I should say.

8th question by same. Did you know any of the members of Capt. Scott's company at the time it went to Mexico?

Answe'. Yes, sir; I knew some of them; I knew Capt. Scott well.

9th question by same. Do you recollect when they left here for Mexico?

Answer. Yes, sir; I recollect when they left here.

10th question by same. Was Solomon Hauenstein a member of that company?

Answer. He never, as to my knowledge, was a member of any military company, and I knew him from the time he came here.

11th question by same. Do you think that he could have gone to Mexico with Capt. Scott without your knowing it?

Answer. As I stated before, he never was out of the city during that time, to my knowledge, and I knew him as well as I knew any man, as well as I knew one of my own children.

12th question by same. Then you are prepared to state that it is impossible that he could have gone to Mexico at the time of the Mexican War; am I right about this or not?

Answer. I am perfectly right about it.

13th question by same. You have stated that he boarded with you, with the exception mentioned, from the time you knew him until he went to California; was not that certainly as late as the year 1848?

Answer. I' must have been; I can't be accurate about dates; I recollect that he finished a pair of boots for P. K. White, who was then a merchant in the city; he packed his tools up, and I saw him leave for California.

14th question by same. What was Hauenstein's business?

Answer. He was a cordwainer, or boot-maker, as it is called.

15th question by same. Did you ever see Hauenstein's handwriting?

Answer. Yes, sir; I have seen him write letters to his mother when she was alive.

16th question by same. Do you think that you would know his handwriting if you saw it now?

Answer. I think I would.

17th question by same. Look at the signatures and addresses of the five letters now shown you, marked A, B, C, D and E, with the depositions of Anna Hauenstein, Henry Hauenstein, Frederick Hauen-
44 stein, John Hauenstein, and Jacob Hauenstein, and say whether or not you think they are in his handwriting?

Answer. The signatures and address on those letters, to the best of my belief, are in his handwriting.

18th question by same. Did you ever hear him speak of having brothers and sisters in Switzerland?

Answer. I have often heard him say that he had a mother and two sisters in Switzerland, and a brother in America.

19th question by same. Did you ever, after his return from California, hear him speak of having been in Mexico?

Answer. No, sir; he never was in Mexico, that is, to my knowledge; he never had nothing to say about Mexico, that is, to my knowledge.

Cross-examined by JOHN A. LYNHAM, counsel for commonwealth:

1st question. Where did you live from January, 1847, to July, 1848?

Answer. In the city of Richmond, sir; always within a gun shot of the Old Market.

2d question by same. Where did Solomon Hauenstein live during that time?

Answer. He first boarded with me on 17th street, a little above Broad, and then boarded with me on the Main street, opposite Saint Charles Hotel.

3rd question by same. Do you mean to state positively that he boarded with you during the year 1847?

Answer. I should say this, that Hauenstein boarded with me all the time, except six months when he went to California; as to being accurate about dates, the date of 1847 or 1848, I couldn't swear about; as I said before about dates, I could not swear, but he was living with me all the time up to the time he left for California.

4th question by same. During all the time that you knew him, was he engaged in the boot-making business?

Answer. He was engaged in making boots until he went to California, and when he returned from California he went to restaurant keeping.

5th question by same. By what name was he generally known?

Answer. He used to go by the name of "Swiss," but when he wrote his name he always signed it Solomon Hauenstein, that is, to my knowledge.

6th question by same. Describe as accurately as you can his personal appearance?

45 Answer. He was dark complected; I should say about five feet and a half high; he generally wore a wig.

And further this deponent saith not.

RICHARD LEE.

Deposition of Thomas Nicholson.

THOMAS NICHOLSON, being duly sworn, deposeth and saith as follows:

1st question by William L. Royall, counsel for Hauensteins. What is your age, place of residence, and business?

Answer. I am in my sixty-seventh year; live at 207 18th street, Richmond, and am a cordwainer by trade.

2d question by same. Did you know the late Solomon Hauenstein, who is supposed to have committed suicide in Richmond about 1861 or 1862?

Answer. Yes, sir.

3rd question by same. How long have you known him?

Answer. Since October, 1844.

4th question by same. Was there, prior to the late war, a cordwainers' society in the city of Richmond?

Answer. There was.

5th question by same. Were you and Hauenstein both members of that society?

Answer. We were.

6th question by same. What position in the society did you hold?

Answer. I was secretary.

7th question by same. As secretary, did you keep the records of the society?

Answer. I did.

8th question by same. Have you those records now?

Answer. Yes, sir; I have these here with me.

9th question by same. Look in those records for the years 1847 and 1848, and say what, if anything, appears there in reference to Solomon Hauenstein.

Answer. I find on the records that he paid twenty-five cents on the 2d day of August, 1847; then he went to keep grocery, and was absent from the society from the 2nd of August, 1847, until the 7th of February, 1848; he continued a member until December, 1848.

10th question by same. State whether or not the records show any payments made by him in the year 1848, and what those payments are.

Answer. Our dues were twelve and a half cents a month, and he paid his dues regularly from July, 1848, until December, 1848.

46 11th question by same. State whether or not the record shows that.

Answer. It does.

12th question by same. In what sums and at what times do those payments appear to be made?

Answer. July, 1848, twelve and a half cents; for August, twelve and a half cents; for September, twelve and a half cents; he missed October; November, twenty-five cents; December, twelve and a half cents.

13th question by same. Did your society have any rule requiring the attendance of its members?

Answer. Yes; it did.

14th question by same. What was the consequence to a member if he failed to attend the monthly meeting?

Answer. Well, for the first night, absence was twenty-five cents fine; the second night 'twas fifty cents; and the third night he had to be notified, and it would make his bill amount to a dollar.

15th question by same. If a man had those fines imposed upon him would or would not the records show it?

Answer. Yes; it certainly would.

16th question by same. Do you find an entry of any fines imposed upon Solomon Hauenstein between the months of July, 1848, and December, 1848?

Answer. I find no fine imposed; he was absent for October, but appears to have been present in November. My book would certainly show a fine for the month of October, unless when he appear', or in November, he had made a proper excuse for it.

17th question by same. I understand you to say, then, that unless Solomon Hauenstein had appeared in person to pay his dues at the monthly meetings spoken of in 1848, your book would show fines imposed upon him; am I right about this or not?

Answer. You are right.

18th question by same. You stated in your answer to the 10th question that your record shows that he paid his dues regularly from July, 1848, until December, 1848; does it not show that he paid them for other months of the year 1848?

Answer. My book shows that he paid them for the months of February, March, April, May, and June, 1848.

19th question by same. Is there nothing of any fine imposed on him during those months?

Answer. There is no entry of any fine, but he appears to be absent one month; I suppose he made a proper excuse for that.

20th question by same. What is the date of the last entry on your book in respect to Hauenstein?

Answer. The last time he was at our society was in May, 1851.

47 21st question by same. In whose handwriting are the entries on your books that you have spoken of for the years 1847 and 1848?

Answer. They are in my handwriting.

22nd question by same. I find that the entry you have referred to as of August 2nd, 1847, is opposite to a name written "Sol. H*olen*stein," and you say that is your handwriting; did you write that name there as the name of the Solomon Hauenstein of whom we have been speaking?

Answer. Yes, sir; I did.

23rd question by same. Did you at that time think that that was the way his name was spelt?

Answer. That was the way I understood it was spelt.

24th question by same. The next entries that I find, of which we have been speaking, for the year 1848, are opposite a name spelled "Sol. H*aun*stein; how did you come to spell his name differently in those two places?

Answer. I met Solomon Haunstein one day on New street; I observed a sign with the name of "Haunstein" on it; I asked him if it was his brother; he would not tell me, but he said that that was the way he spelled his name. The next time I made out a list of names I changed the spelling from "Holenstein" to "Haunstein," and then afterwards I got back some way to the spelling it "Holenstein."

25th question by same. Are you perfectly distinct in your recollection of the particulars of this interview with Hauenstein?

Answer. Yes, sir; I am.

26th question by same. When did you make out your next list of names after this interview?

Answer. The lists were made out every six months; his name is spelt "Holenstein" for the month of August, 1847, and spelt Haunstein for

the month of January, 1848; the list was certainly made out after July, 1847, and before January, 1848.

27th question by same. Then I understand the interview that you speak of with Hauenstein must have taken place between July, 1847, and January, 1848.

Answer. Yes, sir; it did.

Cross-examined by JOHN A. LYNHAM, counsel for the commonwealth:

1st question. Did you have an intimate personal acquaintance with Hauenstein?

Answer. I knew him very well.

2nd question by same. Can you now, after a period of over twenty-nine years, recall his form and features so as to recognize him from the rest of your craft?

48 Answer. Yes, sir.

3rd question by same. Describe him as near as you can.

He was a man about five feet five or six , stout built, inclined to be corpulent, with a square pair shoulders, rather thick neck, dark complexion, with a very nice head of hair; they used to say it was a wig he wore.

4th question by same. Was not absence from the city good excuse for non-attendance upon your meetings, and saved the parties from fines?

Answer. Yes, sir; always a standing excuse.

5th question by same. Then suppose some one had paid Hauenstein's dues in his absence, no marks then would have appeared against him on your books?

Answer. The first night's absence was twenty-five cents fine, the second night was fifty cents, and the third night it was my duty to notify him to attend the third night, and that would have brought his bill to a dollar; I see no item on the book where I ever had to notify him. If he happened to be absent one night he came up the next night and paid all dues and demands.

6th question by same. Within your recollection did it ever occur that any other person paid the dues of Hauenstein or responded for him in your meeting?

Answer. I could not swear to that; they might have done —, because any man may send his dues by another.

7th question by same. Are you, then, willing to swear that the identical Hauenstein you have mentioned was bodily present at each and every time you have mentioned, in 1847 and 1848, and paid his dues with his own hands?

Answer. I am not; but then he was in town all the time.

8th question by same. How do you know that he was in town all this time?

Answer. If he had left town I would certainly have erased his name from the list of names.

And further this deponent saith not.

THOS. NICHOLSON.

STATE OF VIRGINIA,
City of Richmond, to wit:

I, George M. Drewry, a notary public for the city aforesaid, in the said State, do hereby certify that the foregoing depositions were duly taken, sworn to and subscribed before me at the times and places mentioned therein.

Given under my hand this 6th day of July, 1876.

GEORGE M. DREWRY, *N. P.*

49 The deposition of F. Powell, taken on behalf of the commonwealth, on the 11th day of July, 1876, and filed 13th day of July, 1876.

Deposition of F. Powell.

1st. question. Please give your name, age and present residence.

Answer. My name is Frederick Powell, age 68 years, and reside in Fredericksburg, Va.

2d question by same. Please state if you knew Solomon Hauenstein, dec'd; and if so, from and to what time.

Answer. I knew him well from about the year 1838 to 1861, and was with him repeatedly; I boarded him at my house.

3d question by same. Please say if you knew of Solomon Hauenstein *enlisted in* entering the Mexican war service; and if so, all the particulars concerning the same.

Answer. I know that after becoming acquainted well with Solomon Hauenstein he told me that he was in the Mexican war, and said that he had a pretty rough time of it. He told me also that he enlisted for the Mexican war in 1847, and got back to Richmond in 1848. After staying in Richmond for some short time, he went to California, and I think stayed there some one or two years. After that he opened a restaurant near the Old Market.

4th question by same. What were your opportunities of knowing of Hauenstein's life; did you live near him, and did you know him very intimately?

Answer. Why, sir, I lived there in the city with him; I saw him frequently, was intimate and friendly with him, and assisted him in his business; I lived near to him on 18th st. in Richmond; he visited me every day, and was as intimate as brothers. Afterwards I moved up to live in one of his houses on Union Hill; he never hesitated to tell me any of his secrets, no matter what, and I had free access to his business, &c.

5th question by same. About what time in 1847 did you hear of his going to the Mexican war, and about what time in 1848 did he return?

Answer. I think it was some time in the fall of 1847, about Christmas, or after that time; he returned in 1848; I do not recollect the time as he told me; he told me that it was the last war he ever wanted to go into.

6th ques. by same. Are you positive that he told you that it was so late as the fall of 1847 that he went to Mexico? Be particular about the time.

Answer. I think it was in the beginning of 1847; it may have been Jan'y or February, 1847, that he went; I before spoke a little too fast.

50 7th question by same. Then I understand that your recollection is, after the frequent interviews you had with Hauenstein on the subject, that he enlisted for Mexican war in the yearly part of 1847, and returned in 1848?

Answer. Yes, sir, I think that was about the time; all I know of it is what Hauenstein told me.

8th question. Did Hauenstein, or not, frequently talk to you in your private chats about his experience in the Mexican war?

Answer. Yes, we talked over it frequently.

9th ques. by same. In what regiment of volunteers did you learn that he enlisted?

Answer. I don't think I recollect that he stated anything about the regiment or company.

10th q. Did you ever hear him speak of leaving in a Richmond company, or company organized elsewhere?

Answer. I heard him say that he enlisted in a Richmond company.

11th question by same. Were you living in Richmond at the time of said Hauenstein's death; if so, how near to him at that time?

Answer. Yes, sir, I was; I was living about ½ a mile from where he died, and was the second man that got into the house after his death; I was at that time in one of his houses.

Cross-examined by W. L. ROYALL, esq., counsel for pl't.:

1st. Where did you live in the year 1847?

Answer. Here in Fredericksburg.

2d q. When did you move to Richmond?

Answer. In 1854; I dealt a great deal in Richmond before I went there to live, and in that way became acquainted with Hauenstein.

3d q. How often were you in the habit of going to Richmond each year?

Answer. I think I have gone as often as 3 and 4 times year.

4th q. Had you lived in Fredericksburg all your life before the year 1852?

—. No, I did not; I was raised in Spottsylvania Co. within 6 miles of Fredericksburg; I moved to Fredericksburg in 1844; I lived in Richmond from 1854 to 1865.

And further this deponent saith not.

F. POWELL.

The deposition of John Poe, jr., taken by consent, on the day of (date not mentioned), and filed on the 25th day of July, 1876.

51 *Deposition of John Poe, jr.*

1st question by John A. Lynham, counsel for the commonwealth. Give your name and occupation.

Answer. My name is John Poe, jr.; I am chief of police of the city of Richmond.

2nd question by same. Please say if you know Solomon Hauenstien, the subject of this litigation; and if so, when and under what circumstances did you know him?

Answer. I did know him; I knew him from the last part of January, 1847, until 1848, July 30th; I knew him as members of the same company (Company A.) commanded by Capt. Scott, 1st Va. Regiment, as volunteers in the Mexican war.

3rd question by same. What time did Hauenstein and yourself, in the company spoken of, sail from Fortress Monroe?

Answer. He sailed the 22nd, 23d, or 24th of January, 1847.

4th question by same. Do I then understand that Hauenstein returned with you from Mexico, landing at Old Point about the 30th of July, 1848?

Answer. Yes, sir.

5th question by same. Then, as I understand, the said Hauenstein was out of the city of Richmond and State of Virginia from on or about the 20th of January, 1847, to about the 30th of July, 1848?

Answer. Yes, sir; he was.

Cross-examined by WILLIAM S. ROYALL, counsel for Hauensteins:

1st question. How long had you been a member of this company before you sailed from Fortress Monroe?

Answer. Six weeks or two months.

2nd question by same. Did you know personally every member of your company at the time you sailed?

Answer. No, sir.

Re-examined by JOHN A. LYNHAM, counsel for commonwealth:

1st question. Did you or not know Solomon Hauenstein as a member of that company; and if so, by what name was he called?

Answer. When I first went out there I knew very few of the men by names, but after being there some time I got familiar with all their names; I knew Solomon Hauenstein as a member of that company; he went by the name of "Swiss," or "Sweede," as a nick-name, but when they called the roll of the company it was Solomon Hauenstein.

52 Recross-examined by WILLIAM L. ROYALL:

1st question. Are you able to swear positively that Solomon Hauenstein sailed with you and the company from Fortress Monroe for Mexico?

Answer. From the time we sailed until we returned there were only two men in the company who did not go in the same ship and at the same time.

2nd question by same. I put a categorical *answer;* are you able to say positively that Solomon Hauenstein was on the ship on which you sailed from Fortress Monroe? Answer yes or no.

Answer. Yes; for reasons as stated above.

2nd question by same. Then I understand that you have no independent recollection of his being on the ship, but depend only upon those circumstances for your belief; am I right about this or not?

Answer. I have no recollection positive of Hauenstein on the ship. I got acquainted with him, as I did the balance of the company, out there.

3d question by same. Are you able to swear positively that Hauenstein was on the ship that brought you back from Mexico?

Answer. No; I could not swear positively that he was on that ship. I can say this, that as far as I remember that we returned with the same men that we went out with, with the exception of three, which were Robert G. Scott, the captain, John J. Fry, and Robert Donnan, and one other man named W. W. Burton.

4th question by same. What was your position in the company?

Answer. I was a private.

And further this deponent saith not.

JOHN POE, JR.

And now at this day, to wit:

At a circuit court of the city of Richmond, held at the court-room in said city on Friday, the 20th day of October, 1876, being the same day and year first herein mentioned:

JOHN HAUENSTEIN, BY HIS GUARDIAN, FREDERICK HAUENSTEIN; ANDREAS HAUENSTEIN, by his guardian, JOHN HAUENSTEIN; ANNA HAUENSTEIN, and LOUISA KRATTIGER, pl'ts,
against
JOHN A. LYNHAM, ESCHEATOR FOR THE COMMONWEALTH of Virginia, def't.

This cause came on to be this day heard upon the petition of the

53 plaintiffs and the exhibits filed therewith; the answer and supplemental answer of John A. Lynham, escheator, and the papers filed therewith; the depositions of Anna Hauenstein, Henry Hauenstein, Frederick Hauenstein, John Hauenstein, Jacob Hauenstein, and Louisa Krattiger, together with the exhibits therewith; the depositions of Emanuel Francis, B. Hassell, Charles Euker, John A. Lynham, Richard Lee and Thomas Nicholson, together with exhibits filed therewith; the deposition of John J. Fry and Robert C. Donnau and John Hitz, together with the affidavit of said Hitz and the certificate of the Secretary of War for the United States appended thereto, excepted to by defendant and read by the plaintiffs; together with the depositions of John Poe and F. Powell, read by the defendant and was argued by counsel. Upon consideration whereof the court is of opinion that the plaintiffs have no claim upon the fund arising from the sale of the real estate disposed of by the escheator, and doth therefore dismiss their petition, and doth adjudge, order, and decree that the petitioners pay to the defendant his costs by him about his defence herein expended.

On the motion of the plaintiffs, by counsel, who desire to apply for an appeal from this decree, it is ordered that the same be suspended for the period of thirty days from this day. But the plaintiffs are not to have the benefit of this order until they or some one for them shall enter into bond before the clerk of this court, with approved security, in the penalty of fifty dollars, payable to the Commonwealth of Virginia and conditioned according to law.

A true transcript of the record.—Teste:

ALFRED SHIELD, *Clk.*

Clerk's fee for making this transcript is $25.00.—A. S.

A copy—Teste:

GEO. L. CHRISTIAN, *Clerk.*

54 And at another day, to wit, Tuesday, January 16th, 1877, came as well the appellants, by their counsel, as the attorney-general on behalf of the Commonwealth, and the cause having been fully heard upon the transcript of the record of the decree aforesaid and the arguments of counsel, because the court was not then advised of its decree to be pronounced in the premises, time was taken to consider thereof.

And now, at this day, to wit, Thursday, the 25th day of January, 1877 (being the day and year first herein written), came again the parties, by their counsel, and the court having maturely considered the transcript of the record of the decree aforesaid and the arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the said decree. Therefore it is decreed and ordered that the same be affirmed, and that the appellants pay to the appellee thirty dollars damages and his costs by him about his defence in this behalf expended.

Which is ordered to be certified to the said circuit court of the city of Richmond.

And afterwards, to wit, Saturday, January 27, 1877, came again the parties, by their counsel, and on the motion of the counsel for the appellants the court doth certify that the appellants claimed the fund in controversy in this cause, under the provisions of the treaty be-

55 tween the Governments of the United States and the Republic of Switzerland, and that the decision of the court was against the

right which they claimed under said treaty; and, at the request of the counsel for the appellants, the court doth further certify that its decision was placed entirely upon the ground that the aforesaid treaty does not give to the appellants a right to the fund in controversy, even supposing that they are the next of kin, or their representatives, of Solomon Hauenstein, dec'd; which question the court certifies that it did not pass upon.

The reasons stated in writing and filed with the record, referred to in the foregoing decree, is in these words and figures following, viz:

This is an appeal from a decree of the circuit court of the city of Richmond, rendered on the 20th day of October, 1876, in a suit in said court in which the appellants were plaintiffs and John A. Lynham, escheator for the Commonwealth of Virginia, was defendant.

Solomon Hauenstein, a citizen of Switzerland, had emigrated to Virginia, and settled here many years ago; had continued to reside here until his death, and had acquired by purchase and conveyance, at different times, in the years 1856 and 1858, and from different persons, quite a large real estate, of which he continued to be seized and possessed until and at the time of his death, and he died in 1861
56 or '2, intestate, unmarried, and without issue. Having no known heirs, it was supposed that his estate devolved upon the Commonwealth for defect of heirs. There was an inquisition of escheat, which found accordingly, and the said estate came to the hands of the said Lynham, as escheator, who was proceeding to sell the same in the execution of his duties as such, when the appellants, citizens of Switzerland, claiming to be the next of kin, or their representatives, of the said intestate, and to be entitled as such to his said estate, or the proceeds of the sale thereof, filed their petition for the recovery of the same, under the Code of 1860, chapter 113, section 8, page 547, which enacts that when the verdict or such inquest is for the Commonwealth, any person claiming any interest in the lands (escheated), whether legal or equitable, may, before the sale thereof, petition the said circuit court (to which the inquisition is directed to be returned) for redress. To such petition the escheator shall be a defendant. He shall file an answer, stating the objections to the claim, and the cause shall be heard without any unnecessary delay upon the petition, answer, and the evidence." In the petition the petitioners express their willingness to unite in a sale of the property by the escheator. To this petition the escheator accordingly filed an answer, stating the objections to the claim. Evi-
dence was taken and filed on both sides, but chiefly on the side of
57 the petitioners, and especially to prove that they were in fact, as they claimed to be, the next of kin of the said intestate, or their representatives.

On the 20th day of October, 1876, and during the same year in which the petition was filed, the cause came on for final hearing, when the court being of opinion that the plaintiffs had no claim upon the fund arising from the sale of the real estate disposed of by the escheator, (but without deciding whether the petitioners were the next of kin, or their representatives, of the intestate, as they claimed to be), therefore dismissed the petition and decreed that the petitioners pay to the defendant his costs by him about his defence in that behalf expended. From that decree the petitioners applied to a judge of this court for an appeal, which was accordingly allowed, and which is the case now to be disposed of by this court.

We proceed at once to enquire whether the appellants are entitled to the estate of the intestate, Solomon Hauenstein, or the proceeds of the

sale thereof, even if they be in fact, as they claim to be, his next of kin, or their representatives, which latter question will not be decided unless its decision be rendered necessary for the decision of this cause by our opinion on, and decision of, the question first above propounded.

If the appellants, who are citizens of Switzerland, and aliens to the Commonwealth of Virginia, be entitled to the estate, or the pro-
58 ceeds of the sale thereof, which they claim (even admitting them to be, in fact, the next of kin of the said intestate), they must be so entitled either, 1st, under the common law, or 2ndly, under some statute law of the State of Virginia, or 3dly, under some treaty between the United States and the Republic of Switzerland.

1st. Are they entitled under the common law? Certainly not. Under the common law an alien is incapable of taking real estate by descent; (1 Rob. Pr. (new), 125, & cases cited; 2 Kent's Com., 53 marg.)

2ndly. Are they entitled under any statute law of the State? If there was any such law in existence at the time of the intestate's death in 1861 or '2, it is embodied in the Code of 1860, for no law on the subject was enacted after his death and before the publication of the said Code. There is but one provision in that code that can have any bearing on the subject, and that is the 6th section of chapter 115, page 557, which is in these words: "When by any treaty now in force between the United States and any foreign country a citizen or subject of such country is allowed to sell real property in this State, such citizen or subject may sell and convey the same, and receive the proceeds thereof, within the time prescribed by such treaty; and when by any treaty now in force between the United States and any foreign country, citizens of the United States are allowed to inherit, hold, sell, and convey real
59 property lying in such foreign country, the citizens or subjects of such foreign country may inherit, hold, sell, and convey real property lying in this State: provided, however, that such purchase, sale, and inheritance hereinbefore mentioned shall apply only to real estate hereafter purchased and acquired by a citizen or subject of such foreign country." The former part of this section, down to the words "by such treaty," inclusive, constituted the corresponding section of the same chapter of the Code of 1849, when it was engrafted for the first time in our statute law, at the suggestion of the revisers who compiled that code, for reasons set forth in a note to their report, pp. 587–8. In that form the section remained in force until it was amended and re-enacted as it stands in the Code of 1860, by an act passed April 7th, 1858 (acts of 1857–8, ch. 42, p. 44). The said former part of the section does not, and the corresponding section of the Code of 1849 did not, apply to such a case as this, in which there is no treaty in force between the United States and the foreign country of which the claimants are citizens, prescribing any time for their selling and conveying any real property in this State and receiving the proceeds thereof. And the latter part of the said amended section does not apply to the case, by reason of the proviso, which expressly grants its application to real estate purchased and acquired by a citizen or subject of such foreign coun-
60 try after the enactment of said amended section; whereas all the real property in this State which was ever purchased and acquired by Solomon Hauenstein was so purchased and acquired before such enactment. We do not mean to say, however, that it would apply to the case, even if there had been no such proviso; but it is unnecessary to decide that question.

The appellants, then, are not entitled under the statute law to what they claim, and the only remaining enquiry is—

3dly. Are they entitled under any treaty between the United States and the Republic of Switzerland? If they are, it is under the treaty between the two countries which went into operation on the 9th day of November, 1855, and has ever since remained in force, & so was in force at the time of the death of Solomon Hauenstein, in 1861 or '2. It may be found in the 11th volume of the Statutes at Large of the United States, page 590. If they are entitled under this treaty, it is under Article V, which is in these words:

"The citizens of each one of the contracting parties shall have power to dispose of their personal property, within the jurisdiction of the other, by sale, testament, donation, or in any other manner, and their heirs, whether by testament or ab intestato, or their successors, being citizens of the other party, shall succeed to the said property or inherit it, and they may take possession thereof, either by themselves or
61 by others acting for them; they may dispos' of the same as they may think proper, paying no other charges than those to which the inhabitants of the country in which the said property is situated shall be liable to pay in a similar case. In the absence of such heir, heirs, or other successors the same care shall be taken by the authorities, for the preservation of the property, that would be taken for the preservation of the property of a native of the same country, until the lawful proprietor shall have had time to take measures for possessing himself of the same.

"The foregoing provisions shall be applicable to real estate situated within the States of the American Union or within the cantons of the Swiss Confederation, in which foreigners shall be entitled to hold or inherit real estate. But in case such real estate situated within the territories of one of the contracting parties should fall to a citizen of the other party, who, on account of his being an alien, could not be permitted to hold such property in the State or in the canton in which it may be situated, there shall be accorded to the said heir or other successor such term as the laws of the State or canton will permit to sell said property; he shall be at liberty at all times to withdraw & export the proceeds thereof without difficulty, and without paying to the government any other charges than those which in a similar case
62 would be paid by an inhabitant of the country in which the real estate may be situated."

The first clause of this article relates only to personal estate, about which there is no difficulty, aliens being capable of acquiring, holding, and transmitting moveable property in like manner as our own citizens, without any enabling statute or treaty for that purpose (2nd Kent's Com., 62, marg.), though there is a statutory provision to that effect in the Code of 1860, page 557, § 5. There is no personal property involved in this controversy.

The second clause relates only to real estate situated in those States of the American Union or cantons of the Swiss Confederation in which foreigners shall be entitled to hold or inherit real estate. Whenever they are so entitled the same reason exists for the application to such real estate of the provisions made by the first clause in regard to personal property. There were, no doubt, States in the American Union at the time of the making of the treaty, in which foreigners were entitled to hold or inherit real estate situated in such States. But such was not the case in this State at that time, nor at the time of the death of Solomon Hauenstein in 1861 or '2. Though by a statutory provision since made, and to be found in the Code of 1873, ch. 4, § 18, p. 130, it is enacted that "any alien not an enemy may acquire by purchase or de-

scent & hold real estate in this State, and the same shall be trans-
63 mitted in the same manner as real estate held by citizens." But that provision has no relation to this clause, which must of course be governed by the law which was in force at the time of such death.

The second clause has no relation to the real estate mentioned in the 1st and 2nd sections of ch. 115 of the Code of 1860, p. 557, by which any alien, being a free white person & not an enemy, who shall before some court of record of this State declare on oath that he intends to continue to reside therein, is authorized, if he be actually resident therein, and upon such declaration being entered of record, to inherit or purchase & hold as if he were a citizen of this State. For although the second section declares that "any such alien may convey or devise any real estate so held by him, and if he die intestate it shall descend to his heirs, & any such alienee, devisee, or heir, whether a citizen or an alien, may take under such alienation, devise, or descent," yet it is in said section expressly "provided he shall, if an alien, come or be in this State within five years after the alienation, devise, or descent, and before some court of record thereof declare on oath that he intends to reside therein." Now, the second clause of the treaty was certainly not intended and cannot have the effect to abrogate such a provision as the one above mentioned, but was only intended to apply to a case in which the disability of alienage in regard to holding or inheriting real estate
64 was simply removed by the statute, as is done by the 18th section of ch. 4 of the Code of 1873, p. 130, before referred to.

Almost always, if not always, when an alien makes the declaration or oath mentioned in the 1st section of chapter 115 of the Code of 1860, he intends to become a citizen of the State, besides becoming a permanent resident & owner of real estate therein. There was no occasion for saying anything in the section about his being naturalized, especially as it belongs to Congress under the Constitution of the United States "to establish a uniform rule of naturalization."

The 5th section of the same chapter provides for the case of an alien who intends to reside in the State for a temporary period only, and authorizes him, if he resides therein, to "take and hold any lands for the purpose of residence, or of occupation by him or his servants, or for the purpose of any business, trade, or manufacture for a term of years not exceeding twenty-one."

This case, therefore, depends entirely on the true construction of the third clause of the fifth article of the said treaty: "But in case real estate," &c. Under this clause are the appellants, supposing them, as they claim to be, the next of kin or their representatives of Solomon Hauenstein, entitled to sell the real estate in Virginia of which he died seized, and to withdraw and export therefrom the proceeds of such sale, unless there be some statute law of the State authorizing them to do so? Is not this clause of the treaty dependent for its operation
65 and effect upon such State legislation so far as this case is concerned? We think that it is & was intended so to be by the framers of the treaty. Such seems to be the plain meaning of the language used in the clause, "There shall be accorded to the said heir or other successor such term as the laws of the State or canton will permit to sell such property." The words "will permit" seem to be wholly inconsistent with the idea of obligation on the part of the State to prescribe some period for such a sale, or of any right on the part of the person claiming to be such heir or successor to sell such property in a reasonable, or any other time, in case the State should not choose to permit such sale and to prescribe a period for making it. The right

contemplated in the said third clause was intended to be given, if at all, by the concurrent act of the treaty-making power and the State. Otherwise, no doubt, the term or the time during which the sale should be made would have been prescribed by the treaty itself, as had been done by the treaty between the same powers of May 4th, 1848. By that treaty it was expressly provided "that a term of not less than three years should be allowed to" the claimant, "to dispose of such property and to collect and withdraw the proceeds thereof." Why was not a similar provision made in the treaty of November 9th, 1855? Obviously because it was intended that the consent and co-operation of the
66 State should be necessary to give effect to that part of the treaty.

By the Constitution of the United States, Article VI, section 2, it is declared that "this Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land, & the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding." (Code of 1860, p. 21.) Great effect is thus given to these treaties although they are not acts of Congress, but are made by the President, by and with the advice and consent of the Senate, provided two-thirds of the Senators present concur. (Id., page 19; Const. U. S., Article II, section 2, clause two.) A treaty, like an act of Congress, must be in pursuance of the Constitution, & certainly not in conflict therewith. The territory of a State is peculiarly a subject for State legislation, and when it is acted on by Federal power, the constitutionality of the action ought plainly to appear. In regard to the provisions contained in some of the treaties between the United States and foreign countries giving to aliens a right to claim land in the States by descent or the proceeds of the sale thereof, and allowing them a certain time for selling the same and withdrawing the proceeds of such sale, a question was raised by the revisors of the code of Virginia in 1849 as to the constitutionality of such provisions, and to avoid a conflict between the two governments—State and Federal—the revisors recommended the
67 adoption of two sections in the code; which were adopted accordingly. (See their note to their report, page 587, chap. 113, § 18, in 1 Rob., New Pr., pp. 131, 133.) The same views contained in the note are again presented. While we do not express any opinion on this question in this case, because it is not necessary to do so, may we not suppose that the framers of the treaty of 1855 intended to avoid the exercise of at least a doubtful power by omitting such a provision as is contained in the treaty of 1847, giving to the alien claimant a right to sell the real property of a decedent and withdraw the proceeds of sale in a limited period, & by inserting in its stead such a provision on the subject as is contained in the subsequent treaty of 1855? At all events ought we not to construe the latter treaty according to the plain import of its words rather than strain the words for the purpose of arriving at what is called a liberal construction in reference to the claimants? These treaties are authorized to be made for the benefit of the States; & the power to permit or not to permit an alien heir to sell the property and remove the proceeds during a limited period may very safely be left to the discretion of the States.

We are therefore of opinion that, under the treaty of 1855, the appellants, supposing them to be next of kin of Solomon Hauenstein, or their representatives, are not entitled to the proceeds of the sale of his real estate, the laws of the State not having permitted them to sell such

68 property, or to draw or export the proceeds thereof; and that the decree of the court below ought to be affirmed.

The evidence in the case strongly tends to prove that the appellants are, as they claim to be, the next of kin or representatives of next of kin of Solomon Hauenstein, and as it seems to be just and right that generally a man's next of kin, whether citizens or aliens, should succeed to his estate, real as well as personal, at his death intestate, it would have afforded us pleasure to have decided this case in favor of the appellants; but of course we were bound to decide it according to law, which, in our opinion, is against them. We are pleased to know, however, that it is competent to the legislature to afford them any relief to which they may be justly entitled, which we doubt not will be done.

CHRISTIAN, J., dissented from the foregoing opinion of the majority of the court, and the dissenting opinion filed by him in the cause is in these words and figures, to wit:

69 *Dissenting opinion of Christian, J.*

I am constrained to express my unqualified dissent from the opinion of the court in this case.

I am of opinion that it is clearly proved in the record that the plaintiffs in error are the heirs at law of Solomon Hauenstein. This is not denied in the opinion of the court. But, conceding this fact, it is held that they are not entitled to receive the proceeds of the real estate in the hands of the escheator, Lynham, because the legislature of Virginia has failed to fix the period within which the heirs of an alien Swiss who has acquired real estate in this State may be permitted to sell the same.

In my view the whole question in this case must turn upon the true construction to be given to the treaties between the Swiss Confederation and the United States, interpreted with reference to the Constitution of the United States.

The second section of the sixth article of the Constitution of the United States is as follows:

"ART. VI, SEC. 2. This Constitution and the laws of the United States which shall be made in pursuance thereof, and all treaties made
70 or which shall be made under the authority of the United States, shall be the supreme law of the land, and the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

This clause only declares a truth which flows immediately and necessarily from the institution of a national government. The laws made in pursuance of the constitution must of necessity be supreme. A law by the very meaning of the term includes supremacy. It is a rule which those to whom it is prescribed are bound to observe. This results from every political association.

So, too, in regard to treaties, there is equal reason why they should be held, when made, to be the supreme law of the land.

Treaties constitute solemn compacts of binding obligation among nations, and unless they are enforced with strict fidelity the gravest complications with foreign nations would ensue, affecting not only the commercial prosperity, but the peace and honor of the nation. It is, therefore, indispensable that they should have the obligation and force of a law that they may be executed by the judicial power and be obeyed like other laws. After these solemn compacts have been entered into and while they subsist, they ought to have a positive, binding efficacy as laws upon all the States and all the citizens of the States. The peace

of the nation, its good faith and moral dignity, indispensably require that all State laws should be subjected to their supremacy.

It is notorious as a matter of history that treaty stipulations were grossly disregarded by the States under the Confederation. It was probably to obviate this very difficulty that this clause was inserted in the Constitution. And its renowned authors must forever be held in honored veneration, because, among other declared principles of constitutional government, they have brought treaties with foreign nations within the sanctuary of justice as laws of supreme obligation. See 2 Story on the Constitution, 4 ed., § 1838, and cases there cited; Ware v. Hylton, 3 Dal., 270–277.

In Fisher v. Neelson, 2 Pet., 314, the Supreme Court said: "A treaty is in its nature a contract between two nations, not a legislative act. It does not generally effect of itself the object to be accomplished, especially as far as its object is infra territorial, but is carried into execution by the sovereign powers to the instrument. In the United States a dif-
71 ferent principle is established. Our Constitution declares a treaty to be the supreme law of the land. It is, therefore, to be regarded by courts of justice as equivalent to an act of the legislature."

See, also, 5 Mar., Life of Wash., ch. 8, p. 652; 1 Waite's State Papers, 45, 47, 71, 81.

"A treaty," said Mr. Jefferson, "made by the President, with the concurrence of the Senate, is the law of the land, and a law of a supreme order, because it not only repeals former laws, but cannot itself be repealed by future ones."

Now, bearing in mind this interpretation of the Constitution, with reference to the obligatory force and acknowledged supremacy of the treaties made by the United States with foreign nations, let us now consider the terms of the treaties entered into between the Swiss Confederation and the United States, with respect to the rights secured to the subjects of the respective governments, to remove the proceeds of real estate in cases where, by the laws of the respective countries, they cannot inherit such estate.

The treaty of 1847 contained the following provisions:

ART. II. If by the death of a person owning real property in the territory of one of the high contracting parties, such property (i. e., real estate) should descend, either by the laws of the country or by testamentary disposition, to a citizen of the other party, who, on account of his being an alien, could not be permitted to retain the actual possession of such property, a term of not less than three years shall be allowed to him to dispose of such property, and to collect and withdraw the proceeds thereof without paying to the government any other charges than those which, in a similar case, would be paid by an inhabitant of the country in which such real property may be situated."

It is plain if this treaty was now subsisting between the Swiss Confederation and the United States, there could not be the shadow of a doubt that, if within three years after the death of Solomon Hauenstein, the plaintiffs in error had applied for the proceeds of this real estate, the State of Virginia would have been powerless to have resisted their claim, under the treaty of 1847, and they would have had the unquestioned right to receive and remove the proceeds, by the express terms of the treaty. This must be and is conceded. But it is said that the treaty of 1850 governs this case, and that under that treaty the plaintiffs in error are deprived of their right to receive and remove the
72 proceeds of the said real estate. Is this so? Can it be so? Now, when the two treaties are compared it is plain that the only differ-

ence (in respect to this subject) is this: While the treaty of 1847, by its terms, fixed the time at three years within which the property or its proceeds may be removed, the treaty of 1850 fixed no time, but left it to the States of the Union and the Cantons respectively, to fix the period within which this privilege may be exercised. The language of the treaty of 1850 (Art. V,) is this: "There shall be accorded to the said heir or other successor, such term as the laws of the State or Canton will permit so sell such property; he shall be at liberty at all times to withdraw and export the proceeds thereof without difficulty, and without paying to the government any other charges than those which, in a similar case, would be paid by an inhabitant of the country in which the real estate may be situated."

Now, it is said that because the legislature has failed to fix the period within which the rights of the parties under this treaty may be exercised, these rights have been lost, and though these rights arise, and are vested under a treaty which the Constitution declares to be the supreme law of the land, yet they are destroyed by the mere non-action of the legislature. Now it must be conceded that no law of the legislature, antagonistic to the rights of the plaintiffs in error, under this treaty, could be maintained in any court, State or Federal, because the treaty is the supreme law of the land, "anything in the constitution or laws of the State to the contrary notwithstanding." If, then, the rights of the plaintiffs in error, vested in them by a solemn treaty, cannot be divested by the constitution or laws of a State; if they cannot be touched by positive enactments, how can they be divested by mere non-action of the legislature in failing to fix a period within which the right may be exercised?

It is a solecism to say that treaties shall be the supreme law of the land, if they may be defeated, or the rights of parties be divested, by action or non-action of the State legislature. If the State may, either by the action or non-action of its legislature, hamper, impede and destroy rights vested under treaties, why should the general government make any treaties at all? If the States at last are to confer, in their discretion, the rights which the Constitution secures by treaty, why should any treaty be made at all by the general government?

The provisions of the Constitution would be idle and nugatory,
73 if the States may fix the rights of parties notwithstanding solemn treaty stipulations.

To my mind it is plain that the treaty of 1850 simply gave to the State the power, if it chose to exercise it, of fixing the period within which the right of removal of the proceeds of real estate might be exercised. The mere failure of the State to fix the time, certainly cannot deprive parties of rights vested under solemn treaties, which are declared to be the supreme law of the land. I should rather say that the non-action of the legislature was a waiver of its right to fix the period for removal of the proceeds of real estate by the Swiss claimants, and that in the absence of such legislation it may be done at any time after the death of the alien. I am, therefore, for reversing the judgment of the circuit court and directing the escheator to *to* pay over the proceeds of the real estate of Solomon Hauenstein to his heirs-at-law.

74 STATE OF VIRGINIA,
City of Richmond, to wit:

I, George L. Christian, clerk of the supreme court of appeals of Virginia, at Richmond, do hereby certify, that the foregoing is a true copy

of the record and opinions of the court in the case of "Hauensteins v. Lynham, escheator," &c., lately decided by said court.

In testimony whereof I have hereunto set my hand and affixed the seal of the said court, at Richmond, this 29th day of March, A. D. 1877.

[SEAL. GEO. L. CHRISTIAN, C. C.

75 To the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States:

The petition of Henry Hauenstein, Anna Hauenstein, and Louisa Krattiger respectfully represents that the first two are brother and sister, and the latter niece of Solomon Hauenstein, who departed this life in the city of Richmond, Virginia, in the year 1861 or 1862. The said Solomon Hauenstein died without having ever been married, and, therefore, childless, and your petitioners are his next of kin. The said Solomon was seized and possessed at his death of considerable real estate situated in the said city. After his death the escheator for the State of Virginia proceeded to procure the escheat of the said real estate to the State of Virginia. He prosecuted his proceedings to a verdict for the State, and was proceeding to make sale of his said property when your petitioners, in accordance with the laws of the State of Virginia,

76 presented their petition to the circuit court of the city of Richmond praying that the proceeds of the sale, in which they expressed themselves willing to join, should be paid over to them. Your petitioners, being the heirs of the said Solomon, claimed his property under the provisions of the treaty made and entered into between the Government of the United States and the Republic of Switzerland (of which republic your petitioners are citizens), which said treaty was ratified in the year 1855, and will be found in the 11th volume of the Statutes at Large, page 590. The said circuit court dismissed their said petition, and upon an appeal to the supreme court of appeals for the State of Virginia the said court of appeals affirmed the decree of the said circuit court, deciding and decreeing against the right which your petitioners claimed under the said treaty on Thursday, January the 25th, 1877. All which will appear by reference to a transcript of the record in said cause presented herewith, under the name and style of Hauensteins v. Lynham, escheator, &c.

Your petitioners assign for error the decision of the said supreme court of appeals against their claim under said treaty, the said court holding that the said treaty gives your petitioners no right to

77 claim the said property, while your petitioners affirm and maintain that it does. The said supreme court of appeals is the court of last resort in law and equity in Virginia.

Your petitioners therefore pray for a writ of error, with a citation directed to John A. Lynham, escheator for the commonwealth of Virginia, to operate as a supersedeas, to the said supreme court of appeals of Virginia, being the highest court of law or equity of the State of Virginia in which a revision of the suit could be had, to bring up said record to the Supreme Court of the United States for review and for correction of the errors apparent therein, according to the forms and effect of the statute in such case made and provided.

HENRY HAUENSTEIN,
ANNA HAUENSTEIN,
LOUISA KRATTIGER,
By their Counsel.

(Indorsed:) Hauensteins v. Lynham, escheator. Petition for writ of error.

78 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of appeals of the State of Virginia, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of appeals before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Henry Hauenstein, Anna Hauenstein, Louisa Krattiger, John Hauenstein, by his guardian, Frederick Hauenstein, Andrew Hauenstein, by his guardian John Hauenstein, appellants, and John A. Lynham, escheator for the commonwealth of Virginia, appellee, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the
79 decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said appellants, as by their complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be herein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief Justice of the said Supreme Court, the twenty-third day of February, in the year of our Lord one thousand eight hundred and seventy-seven.

D. W. MIDDLETON,
Clerk of the Supreme Court of the United States.

Allowed by—

M. R. WAITE,
Chief Justice Sup. Ct. U. S.

The foregoing writ of error was filed in the clerk's office of the supreme court of appeals of Virginia on the 24th day of February, 1877.

Teste:

GEO. L. CHRISTIAN,
Clk of the Sup. Court of Appeals of Va.

80 Know all men by these presents that we, John Hitz, W. G. Metzerott, and W. M. Galt, of Washington City, District of Columbia, are held and firmly bound unto John A. Lynham, escheator for the commonwealth of Virginia, in the full and just sum of three thousand dollars, to be paid to the said John A. Lynham, escheator for the

commonwealth of Virginia, certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals, and dated this twenty-third day of February, in the year of our Lord one thousand eight hundred and seventy-seven.

Whereas lately at a supreme court of appeals of the State of Virginia, in a suit depending in said court between Henry Hauenstein, Anna Hauenstein, Louisa Krattiger, John Hauenstein, by his guardian, Frederick Hauenstein, Andrew Hauenstein, by his guardian, John Hauenstein, appellants, and John A. Lynham, escheator for the commonwealth of Virginia, judgment was rendered against the said Henry Hauenstein, Anna Hauenstein, Louisa Krattiger, John Hauenstein, by his guardian, Frederick Hauenstein, Andrew Hauenstein, by his guardian, John Hauenstein, appellants, and the said appellants having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said

citing and admonishing to be and appear at a Supreme Court of the United States, to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said appellants shall prosecute the writ of error to effect, and answer all damages and costs if they fail to make their plea good, then the above obligation to be void; else to remain in full force and virtue.

JOHN HITZ. [L. S.]
W. G. METZEROTT. [L. S.]
W. M. GALT. [L. S.]

Sealed and delivered in presence of—
F. JACOB MAGER.
A. B. MITCHELL.

Approved by—

M. R. WAITE,
Chief Justice, &c.

The original of which the within is a true copy was filed in the clerk's office of the supreme court of appeals of Virginia on the 24th day of February, A. D. 1877.

Teste:

GEO. L. CHRISTIAN,
Clk Sup. Court of Appeals of Va.

81 The United States of America to John A. Lynham, escheator for the commonwealth of Virginia, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of appeals of the State of Virginia, wherein Henry Hauenstein, Anna Hauenstein, Louisa Krattiger, John Hauenstein, by his guardian, Frederick Hauenstein, Andrew Hauenstein, by his guardian, John Hauenstein, are plaintiffs in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this twenty-third day of February, in the year of our Lord one thousand eight hundred and seventy-seven.

M. R. WAITE,
Chief Justice Sup. C't U. S.

82 On this first day of March, in the year of our Lord one thousand eight hundred and seventy-seven, personally appeared Frank D. Miller before me, the subscriber, and makes oath that he delivered a true copy of the within citation to John A. Lynham, escheator, on the 1st day of March, 1877.

FRANK D. MILLER.

Sworn to and subscribed the 1st day of March, A. D. 1877.

THOMAS S. ATKINS,
U. S. Com'r E. Dist. of Va.

A copy of the within citation was filed in the clerk's office of the supreme court of appeals of Virginia, Feb'u'y 24th, 1877.

Teste:

GEO. L. CHRISTIAN,
Cl'k Supr. Court of Appeals of Va.

(Indorsed:) Hauensteins vs. Lynham, escheator, &c. Copy record. Fee for copy, &c., $35.82.

(Indorsement on cover:) No. 133. Henry Hauenstein, Anna Hauenstein, Louisa Krattiger, John Hauenstein, by his guardian, Frederick Hauenstein, et al., plaintiffs in error, vs. John A. Lynham, escheator for the commonwealth of Virginia. Virginia sup. c't of appeals. Filed 11th April, 1877.

REC. 133—5

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IN THE

SUPREME COURT OF THE UNITED STATES.

HAUENSTIENS
vs.
LYNHAM. } No. 133.

BRIEF FOR PLAINTIFF IN ERROR.

The assignment of error is found in the petition to this court for a writ of error (Record, p. 50).

I refer to the petition for an appeal to the Virginia court of appeals (record, p. 1 et seq), in which the construction that the treaty is to receive is fully discussed, and to the dissenting opinion of Christian, J., (record, p. 47) further discussing its construction, as a part of my brief. This note is intended to be supplementary to those two discussions.

The case of *Fredrickson vs. Louisiana*, 23 How., is referred to as holding that the treaty is only intended for the benefit of Swiss heirs to those who die Swiss subjects. The sole question in that case was whether a citizen of Wurtemburg, to whom a citizen of Louisiana willed property, was liable to the legacy duty which the Louisiana statute imposed upon all legacies to persons domiciliated outside of Louisiana. It was said that this was a discrimination against the citizen of Wurtemburg, which was not applied to the citizen of Louisiana, and that the treaty forbade this. The court decided that the act of assembly applied to a citizen of Louisiana domiciliated in Wurtemburg as well as to a citizen of Wurtemburg, and, therefore, that the discrimination contended for did not exist. This was the decision of the court, and all else that the judge delivering the opinion may have

said was merely *obiter dictum*. But there is nothing in the remarks of the judge which conflicts with the construction of the treaty for which I contend. It did not appear in the case that the decedent testator was a citizen of Wurtemburg, who had become naturalized as a citizen of Louisiana. He may have been an Englishman or a Frenchman, and of course the treaty with Wurtemburg was not made to apply to Englishmen or Frenchmen.

The Virginia court of appeals held that the treaty with Switzerland was intended only to guarantee to the Swiss subject such rights in respect to his ancestor's real estate as the Virginia statute, to be passed by her legislature in conformity to that treaty, might give to him. The court's argument is completely met by the dissenting opinion of Christian, J., (page 47, record). I wish to add to what that learned judge has said, the following remark. If that was all that it was intended the treaty should do, then the treaty was mere *brutum fulmen*. It gave no right whatever. It merely declared that if the laws of the State of Virginia should allow a Swiss heir to sell his ancestor's real estate and remove the proceeds, that then he might do so; but that if the laws of the State of Virginia would not allow him to sell his ancestor's real estate and remove the proceeds, that then he should not have that right. What is this but making the Swiss subject's right depend at last upon the Virginia law; and what approach to a right does the Swiss subject acquire by virtue of the treaty? If that construction of the treaty is the correct one, then the treaty, so far as the provision regarding real estate is concerned, may just as well not have been made. The rights of Swiss subjects are neither increased nor diminished, but are left just as they would have been without any treaty at all. I insist that it was intended by the treaty to declare that the State might regulate the manner of selling and removing the proceeds if she chose to act in the matter. But that if she chose to pass no law on the subject, that then the Swiss subject should have a reasonable time, by virtue of the treaty itself, to sell and remove, in spite of any State statute to the contrary.

The opinion of the Virginia court of appeals suggests the question, whether it would be within the scope of the treaty-making power to regulate descents and alienations of real estate within the States. It is to be remarked first, that the treaty with Switzerland makes no attempt to regulate that subject. It only declares that if a State allows a Swiss

to acquire real property, she shall not rob him of it afterwards; and though she may expel him from her borders, yet she shall not prevent him from converting the real estate, which she allowed him to acquire, into money, and removing the same with him; and that she shall not rob his heirs when he dies, but that they shall also have that right. This is no attempt at regulating descents or alienations of lands. It is only a right guaranteed to foreigners as a means of encouraging immigration.

What limitation can be put upon the treaty-making power? I submit that there is no limitation that can be put upon it. It is supreme. It can do whatever the emergency, in respect to which it is called upon to act, may demand. For instance, if this Government were to go to war with Great Britain, and the fortune of arms should enable Great Britain to overthrow and overrun us—to reduce us to the absolute helplessness and prostration of France after the Franco-Prussian war—the treaty-making power would go the length of empowering the Government to purchase peace on whatever terms the British should demand, even to the extent of the cession of States. This must be so in the nature of things. See this proposition elaborated in Mr. Pinkney's celebrated speech on the treaty-making power, which may be found in the 3d volume of "Eloquence of the United States," page 231.

Now it would not be contended that the treaty-making power could deal with matters not properly within the scope of the treaty-making power under a pretence of making a treaty. The treaty-making power's field is the matter of intercourse between this power and other powers. Whatever, therefore, is pertinent to regulating intercourse between this Government and foreign governments is within the scope of the treaty-making power. And nothing, it is submitted with confidence, can come more appropriately within the province of regulating intercourse than the power to say to persons, whom we invite to immigrate here: "any property which you acquire shall be guaranteed to you, and when you die it shall go to your natural heirs or to your devisees." There is no one power, which so directly concerns the ability to invite immigration successfully as this one; and there is no subject more eminently within the scope of the treaty-making power than the matter of inviting immigration.

The case of *Shanks vs. Dupont*, 3 Peters, 242, expressly decides that

it is within the scope of the treaty-making power to provide that aliens may take the proceeds of land situated within a State whose laws forbid them to take. In that case the alien was given the fund, under the provisions of the treaty, although the laws of South Carolina forbade him to have it. The case of *Ware vs. Hylton*, 3 Dallas, 199, decides that when a State law comes into contact with a treaty, the treaty repeals and destroys the State law.

As will be seen by the escheator's supplemental answer (record, p. 14), he claims that the fund realized from the sale of these houses shall pay him the commissions which the State allows her escheators and counsel fees for representing him in the various litigations in which he has been concerned. The writ of error and supersedeas from this court to the court of appeals of Virginia was allowed on the 23d of February, 1877, and was filed in the clerk's office of the court of appeals on the 24th of February, 1877 (record, p. 51). Yet the circuit court of the city of Richmond undertook, on the 5th of March, 1877, to allow the escheator, out of the fund, what he claimed for his commissions, expenses and counsel fees, as will appear from a certified copy of an order made by the circuit court for the city of Richmond, filed with the clerk of this court, a printed copy of which is attached to this brief.

Whether or not the escheator was to be allowed to take such a sum from the fund was one of the questions to be determined in this cause, and I submit that after this court had awarded its writ of error and supersedeas, the circuit court had no power to make any order whatever in respect to the fund. To prevent this cause coming back here, in case the court should hold that the plaintiffs in error are entitled to the fund, the court is respectfully asked to determine now, while the cause is here, the question what, if any, amount the fund is liable to be reduced by way of commissions to the escheator. The Virginia statute allows the escheator, where he escheats property and sells it for the benefit of the Commonwealth, to retain ten per cent. of the amount for his commissions (V. C., 1873, chap. 109, sec. 24, p. 876), and the escheator lays claim to a further sum, how much it is impossible to say, for his expenses and counsel fees. Ought this fund, if the plaintiffs in error are entitled to it under the treaty, to have to bear either of these? Why should it pay the expenses of an escheat which the property was not liable to? If the escheator has rendered services to the Commonwealth

of Virginia for which he ought to be paid, let the Commonwealth of Virginia pay him for those services. But their burden should not be thrown upon parties as to whose interests he was in hostility in all his proceedings. The treaty would seem to have intended to provide expressly against this very thing. If the escheator's claim is to be allowed, he may consume the entire fund with his commissions and other claims. As he, in a measure, acted as the agent of the plaintiffs in error in making the sale, they having stood by and declared that they would ratify his sale, I think they ought to pay what the Virginia law allows to commissioners making sales of property, which is five per cent. on the first three hundred dollars, and two per cent. on all above that (V. C., 1873, ch. 174, sec. 6, p. 1124).

The terms of the treaty, and justice to all parties, would seem to forbid making these plaintiffs in error pay more. As the escheator's claim is set up in the record, the court is most earnestly requested to decide upon it whilst this cause is here; otherwise, the State court may allow the escheator's claim and force the plaintiffs to bring this cause here again.

The attention of the court is asked to the original letters in German from Solomon Hauenstein at Richmond to his brothers in Switzerland, of which translations are in the record, which have been sent by the Virginia court of appeals, under its seal, into this court for its inspection. See the order of that court certified to this court.

WM. L. ROYALL,
For Plaintiffs in Error.

APPENDIX A.

VIRGINIA:

In the circuit court of the city of Richmond, March 5, 1877:

Henry Hauenstein, Ann Hauenstein, Louisa Kratliger, and others, - - - - - - Plaintiffs,
against
John A. Lynham, escheator for the Commonwealth of Virginia, - - - - - - Defendant.

For reasons appearing to the court, it is hereby ordered that so much only of the last order entered herein on the 2d of March, 1877, as directed a deposit of the funds of this cause in the State Bank of Virginia be revoked. And J. A. Lynham, escheator, is directed, in accordance with the terms of the aforementioned decree, to deposit said funds in the Richmond Banking and Insurance Company to the credit of this court in this cause, the said bank to pay such interest thereon as may be agreed upon from such deposit. The deposit so made will be the net fund due the Commonwealth of Virginia, and the said Lynham, escheator, have leave to take therefrom to himself the balance that may be due him for his costs and expenses incurred in the litigation, which he will hereafter report to this court with his vouchers for examination and approval, and at the same time return a certificate of deposit from said Richmond Banking and Insurance Company, showing a compliance with this order and relieving him from all responsibility as the custodian of the fund.

A Copy—Teste,

ALFRED SHIELD, Clerk.

No. 133.

HAUNSTEIN'S HEIRS

vs.

LYNHAM, ESCHEATOR.

BEFORE THE

SUPREME COURT OF THE UNITED STATES.

ARGUMENT FOR THE APPELLEE.

IN THE

SUPREME COURT OF THE UNITED STATES

HAUNSTEIN'S HEIRS,
v.
LYNHAM, ESCHEATOR. } No. 133.

To the Honorable Judges of the
Supreme Court of the United States:

This cause has been twice decided in favor of the appellee, the State of Virginia, by the supreme court of that state. The first decision, upon the subject matter here involved, will be found under the name of Sands *v.* Lynham, Escheator, 27 Grattan, page 291; and the other, which is here directly appealed from, will be found in 28 Grattan, page 62.

There is really nothing left for the appellee's counsel before this high court, but simply to beg careful perusal of the able, elaborate and convincing opinion of the supreme court of Virginia (in the last mentioned case) delivered by the learned and profound jurist, the president of that court. (See the same, commencing on page 42 of the record.) Therein is embraced the judgment of the court here appealed from.

The only question before that court, and now before this, is the extent, purpose and effect of the treaty of 1855, between the United States and the government of Switzerland, 11th volume of the Statutes at Large, page 590. For, unable to set up any pretence of right under the laws of Virginia, candor compelled the

appellant's counsel to say in their petition to the supreme court of Virginia, that "no attempt is made by your petitioners to claim this property under the provisions of section 2, chapter 115, Code of Virginia, and it seems to them that the laws of Virginia forbid them to have said property on any other conditions, but they base their claim upon the treaty," &c., (page 2 of the record). This very proper disclaimer narrows the discussion down to the consideration of that treaty alone.

My first proposition is, that this court has not the jurisdiction to hear and determine this matter, unless it should appear from the record that the decision of the state court was *against* the validity of that treaty.

In Cooley's Constitutional Limitations, pages 11 and 12 (with numerous authorities cited), will be found the doctrine that "the national courts are bound to respect the decisions of the state courts upon all questions arising under the state constitution and laws, where no question of national authority is involved, and to accept those decisions as correct and to follow them whenever the same questions arise in the national courts. This to prevent unseemly and dangerous collisions of judicial authority, &c. And to give the United States supreme court jurisdiction over the state tribunals, it must appear by the record that the decision of the state court was *against* the validity of the treaty."

Reference is invited also to 19 Wallace, 635; 1 Otto, 578, 594 and 690; also to case of Murdock *v.* City of Memphis, on page 626 of 20th Wallace.

Mr. Justice Miller there said that the existence of such a question does not give jurisdiction. "It must have been decided in a certain way, that is, against the right set up under the constitution, laws, treaties," &c. "The federal question may have been erroneously decided." The court say, that even "though a wrong construction has been given to the federal law, yet if the right claimed under it by the plaintiff in error has been conceded to him, this court cannot entertain jurisdiction of the case." So narrow is this jurisdiction of 1789 and 1867, over judgments of the state courts. "The state courts are the appropriate tribunals, as this court has repeatedly held, for the decision of questions arising under their local law, whether statutory or otherwise." So, if there be anything else in the record upon which to rest the judgment of the state court, other than that against the validity of a federal law, the United States supreme court will do so, and not act "upon a principle which implies a distrust of their (the

state courts') integrity, or of their ability to construe those laws correctly."

Nothing of the kind appears in this case. For not in one sentence anywhere did the judgment of the state court in this cause call in question or affect the validity, power or extent of this treaty or any other; but sustaining it throughout—and the power that made it—simply construed its plain language, giving it all the power and force that was intended, and but carrying into effect the very words and intent of the framers of that instrument. It is difficult, then, to understand the opinion of the *one* dissenting judge, as well as the views of the appellants' counsel, all of whom seem to think and write as if in this little isolated case of Haunstein's depends the existence of the great treaty-making power of the government.

In their zeal for the supreme power and authority of treaties generally, they forget to examine *this treaty*, to see what, in this one instance, was intended to be obligated and assumed by the contracting powers. Judge Moncure and his three associates do not fail to point out this fact, sustaining and construing the treaty under consideration, and but giving it the scope and extent intended by its framers.

The effort is constantly and repeatedly made (*vide* also the motion made before this court October, 1877, to advance this cause, which was denied, because, as this court said, there was no question of public interest,) to dignify this little matter, and to show that great laws are in jeopardy, and that this case should be elevated to national importance, whereas its application is only to the State of Virginia, and in no wise and in no manner affects the rights of foreign subjects to any property, by descent or otherwise, in any *other* state of this Union. For, as Judge Moncure says for the court, "there were, no doubt, states in the American Union at the time of the making of that treaty, in which foreigners were entitled to hold or inherit real estate situated in such states. But such was not the case in *this state* at that time, nor at the time of the death of Solomon Haunstein." (Page 44 of the record.)

The treaty, by express terms, left it to the states to say how, when and in what manner these foreigners should succeed to the freehold. At this time they would not be excluded by the laws of Virginia even, and this being the first, is no doubt the last of the kind ever to occur in that state. Where, then, is its importance?

I will show, then, how it was at *that time* these Swiss subjects failed

to inherit our lands in this isolated case, ever to stand by itself without influence or effect anywhere or to any person.

On the 8th of November, 1855, there was a ratification of a treaty between our government and that of the Swiss Confederation. The fifth article of that treaty alone concerns us.

In it—primarily—is conceded the recognized right of the subjects of the respective governments to the possession and disposition of *personal* property—a right about which there could be no questions to arise or objections raised by the states. But perceive the difference in the treaty when these *lawyers* were contracting as to *real estate*, where Chancellor Kent said, by the common law, "the freehold was never cast (by descent) upon an alien who could not retain it."

They therefore say:

"The foregoing provisions (about personalty) shall be applicable to *real* estate situated within the states of the American Union, or within the cantons of the Swiss Confederation, in which foreigners *shall be entitled to hold or inherit real estate.*" And applicable in no other case. Then, following the treaty as to this, concludes: That if, as in the case before us, "real estate should fall to an alien who could not, by the *law of the state*, hold it, then there shall be accorded to the alien heir such terms as the *laws of the state* or canton *will permit*, for him to make sale of such property, and if sold, he shall be at liberty to withdraw or export the proceeds without vexatious delays, charges," &c.

Observe, if the court please, the great care and circumspection exercised by the treaty-makers in their expressed and unambiguous intention to respect the local laws of state and canton in this important particular. The idea is made prominent in the very first article of the treaty, where it is said: "The citizens of the United States of America and the citizens of Swizerland shall be admitted and treated upon a footing of reciprocal equality in the two countries, where such admission and treatment *shall not conflict with the constitutional or legal provisions, as well federal as state and cantonal, of the contracting parties* * * yielding obedience to the laws, regulations and usages of the country wherein they reside." In closing that first article of the treaty those privileges are, however, excluded as to "a participation in the property of communities, &c., of which the citizens of one party, established in the other, have not *become members*," &c. And the sixth article of that treaty, as follows: "Any controversy that may arise among the *claimants to the same succession*, as to whom the property

shall belong, shall be decided according to the laws and *by the judges of the country in which the property is situated.*"

That law, in reference only to this particular case, has been expounded and settled under that treaty and in accord with it by the judges of the highest tribunal in Virginia, and yet counsel, for the sake of argument, loosing sight of the powers guarded and delegated by the treaty to the states, and forgetting to construe it according to its plain terms and meaning, upon some elevated ideas as to what the treaty *should be*, to override everything else in favor of these *very doubtful and pretended heirs*, as Judge Moncure says, would "strain the words for the purpose of arriving at what is called a liberal construction in reference to the claimants." "These treaties are authorized to be made for the benefit of the states, and the power to permit or not to permit an alien heir to sell the property and remove the proceeds of sale during a limited period may very safely be left to the discretion of the states." So said the learned president of the Virginia court in this case. (Page 46 of the record).

The arguments on the other side are mere abstractions, dealing with hypothetical cases, and really they, not us, assailing this very treaty and would extend it, because its scope was not great enough to cover, *regardless* of state law, over this particular case in which these doubtful claimants have fallen in between. I say doubtful claimants, because the record shows that they have not, as yet, established their identity as the rightful heirs.

The burthen of their argument goes to the effect that these treaty-makers did not go far enough, and really did not intend to do what was done by them. As if they had not the power to write the treaty as it pleased the contracting powers to make it.

What is the history of this Virginia legislation that is so plainly against them that the counsel for the appellants admit they can found no right or demand under it?

Mr. Conway Robinson in his First (Va.) Practice, page 131, speaks fully of it. The revisors of the Virginia Code noting the ratifications of these treaties, one with the King of Wertemburg of 1844, King of Bavaria of 1845, and King of Saxony of 1846, all, to some extent, like the one here (of 1855) under consideration, as a condition precedent, they remanded the subject for legislation under and by the laws of the respective states. And under these treaties, so plainly inviting it, the Virginia legislature was invited to act at once, as the framers of those treaties (and particularly this one of 1855 with

Switzerland) desired to avoid the exercise of at least a doubtful power, such as had been exercised in 1848. And as our court of appeals say, this treaty of 1855 was so changed and carefully worded, "obviously because it was intended that the consent and co-operation of the state should be necessary to give effect to that part of the treaty."

The Virginia legislature responded, and on the 7th of April, 1858, passed the following act with direct reference (it would seem) to the treaty now under consideration:

"When by any treaty now in force between the United States and any foreign country, a citizen or subject of such country is allowed to sell real property in this state, such citizen or subject may sell and convey the same, and receive the proceeds thereof within the time prescribed by such treaty; and when by any treaty now in force between the United States and any foreign country, citizens of the United States are allowed to inherit, hold, sell and convey real property lying in such foreign country, the citizens of such foreign country may inherit, hold, sell and convey real property lying in this state: provided, however, that such purchase, sale and inheritance, hereinbefore mentioned, shall apply only to real estate *hereafter purchased and acquired* by a citizen or subject of such foreign country."

It so happened that Haunstein purchased and acquired all of his property before that act, as the record shows (pages 29 to 32 of the record). And to this legislation that Virginia was invited to make, as she thought proper to make, because, *to fit this single case*, she did not choose to make it *retroactive* in its effect, we are told by learned gentlemen that the constitution of the United States, and under it the great treaty-making power, are all seriously jeopardized, and therefore their great alarm; and in view of the fact, too, that this is the only recorded case in Virginia where this statute has *happened* to affect, and the law now so entirely changed that at this time there are no restrictions whatever on the inheritance of aliens.

For without discussing *this* treaty and its intended application, the whole scope of the (one) judge's dissenting opinion is, that rights once vested by a treaty cannot be divested by state laws. But it will be observed that he fails to show how, by the treaty in question, of 1855 (not 1850, as he refers to it), these rights were vested in the claimants. It is easy to thus discuss it as if it were an unqualified grant to them, but if liberally to be construed, why not construe the important qualifications before referred to, making the inheritance primarily conditional

on the laws of the state? In giving the legal construction of a contract, must the whole instrument, or only *a part of it*, be considered? The treaty was neither defeated by "action or non-action of the legislature," for legislative action was in accord with it, and never exceeded what the treaty itself permitted to be done.

No reference is made to the two cases, one in 8th Howard, page 493, and other case of Fredericks *et al.* v. State of Louisiana, 23d Howard, page 446, but I beg this court to refer to them. In the latter case this court, affirming the construction by the supreme court of Louisiana of a treaty between the United States and the King of Wurtemburg, where there was an *unconditional* right of the alien's inheritance which the state proposed to tax, referred to and reaffirmed the former case which Chief-Justice Taney characterized as—"This is a plain case," and following used this pertinent and plain language: "NOW, THE LAW IN QUESTION IS NOTHING MORE THAN AN EXERCISE OF THE POWER WHICH EVERY STATE AND SOVEREIGNTY POSSESSES OF REGULATING THE MANNER AND TERMS UPON WHICH THE PROPERTY, REAL OR PERSONAL, WITHIN ITS DOMINION MAY BE TRANSMITTED BY LAST WILL AND TESTAMENT, OR BY INHERITANCE, AND OF PRESCRIBING WHO SHALL AND WHO SHALL NOT BE CAPABLE OF TAKING IT. EVERY STATE OR NATION MAY UNQUESTIONABLY REFUSE TO ALLOW AN ALIEN TO TAKE EITHER REAL OR PERSONAL PROPERTY SITUATED WITHIN ITS LIMITS, EITHER AS HEIR OR LEGATEE, AND MAY, IF IT THINKS PROPER, DIRECT THE PROPERTY SO DESCENDING OR BEQUEATHED SHALL BELONG TO THE STATE. IN MANY OF THE STATES OF THIS UNION AT THIS DAY REAL PROPERTY DEVISED TO AN ALIEN IS LIABLE TO ESCHEAT. AND IF A STATE MAY DENY THE PRIVILEGE ALTOGETHER, IT FOLLOWS THAT WHEN IT GRANTS IT, IT MAY ANNEX TO THE GRANT ANY CONDITION WHICH IT SUPPOSES TO BE REQUIRED BY ITS INTEREST OR POLICY."

Is it not, then, surprising how, by high asseveration and lengthy arguments, the fate of the country is made to depend on *this case?*

"A treaty is only regarded as the law of the land when it operates of itself without any legislative provision. When its terms import a contract to perform a particular act, the treaty addresses itself to the political, not the judicial department, and then the legislature must execute the contract." So said the court in 2d Peters, 314, and 6th Wheaton, 19.

Now, bearing in mind, if your Honors please, that under the invitation of the treaty of November, 1855, Virginia never *even exceeded* the power therein granted and conceded to her, (if it be contended

that in the disposition of her real estate she had to look directly to that treaty). In this respect she scrupulously adhered to it. She claimed no greater rights, if quietly it was supposed, as to her freehold, she had. Her legislature never assailed or impaired that treaty in any respect. She but gave it, as invited to do, local interpretation with reference to Virginia law. Her highest court, giving the treaty all the majesty and power that could be claimed for it, simply construed the laws of Virginia with respect to it. And had she not the right to do this?

This court, in 4th Otto, page 267, said: "The laws of the states are to receive their authoritative construction from the state courts, and this is so obviously correct as to be unnecessary to refer to authorities." Furthermore, in 17th Wallace, 651, this court said: "In construing state statutes affecting titles to real property, where no federal question is involved, infinite mischief would result if a different rule was adopted by the federal tribunal from that of the state courts, and the state courts must be sustained whatever may be our opinion of the original soundness of their judgments." 22d Wallace, 230.

It is the established doctrine that the "*Lex Loci rei Sitæ*" always governs.

So it was said in Brine *v.* Insurance Co., 6 Otto, pages 635-6. "The title, transfer, disposition, descent and alienations of real property is *exclusively* subject to the laws of the country where it is situated, which can alone prescribe the mode by which a title to it can pass from one person to another, and to the laws of the state must we look for the rules which govern, and for the effect and construction of conveyances. That being a part of the contract under which parties hold under state law, no subsequent provisions by United States laws affects the subject whatever." McGoon *v.* Scales, 9th Wallace, 23; U. S. *v.* Fox, 94 U. S. 315; Edmunds *v.* Kearzey, supra, 598; Brownson *v.* Kinzie, 1 How. 311; Clark *v.* Reyburn, 8th Wallace, 318; 7th Cranch. 115; 1st Otto, 14. McCormick *v.* Sullivant, 10th Wheat, 192.

And because of these and other authorities so clearly and fully establishing this just and proper doctrine, Judge Black, when recently asked his views as to the powers of a state to make provision against the evils apprehended from Chinese emigration, replied in a public letter, "that the prevalent notions of the effect of a federal treaty are erroneous, and that a domestic regulation or federal statute, if consistent with the constitution, is not void because it conflicts with a treaty."

In this case we have a domestic regulation, as to most sacred rights, that has no conflict with this treaty nor the constitution—never delegated to the United States, but ever reserved to the states, respectively.

The effort of Virginia seems to have consistently been of her own accord to conform her legislation to all United States laws on this subject. For before this treaty and up to the act of April, 1858, before recited, the requirement was, that before succeeding to real property in Virginia, the alien must take up a domicile there. And this provision only changed in the manner alluded to (after this treaty) by the aforesaid act of April, 1858. That treaty refused, of itself, to give aliens any such (reserved) rights, because of their not being members of our community. But by these lawyers (who appeared to know Virginia law as well as constitutional law) it was left to the generosity of the state, and in the language of President Moncure, "It was intended so to be by the framers of the treaty."

In view of what has been said, it is not considered in the least necessary or important to the appellee's case, yet, as simply an interesting fact, the enquiry might very properly be made as to the political status of Mr. Solomon Haunstein at the time of his death. Was he an alien, or was he a citizen naturalized? For the purposes of this case, in my opinion, it matters not whether he was alien or citizen; for in either event the treaty itself precludes these alien appellants. But, unquestionably, the answer must be that he was a citizen of the United States. He had lived in the city of Richmond for over twenty years; he had acquired property here and settled here with no intention to return to the place of his birth, as his letters and testimony show. The records of the circuit court of Richmond, which would, no doubt, show this fact, were destroyed in the burning of this city, but every presumption of law points directly to the fact that this owner of real estate, here at his own home, became a citizen among us. Furthermore, Haunstein must of necessity have proceeded to become a citizen, for when he bought this property (in 1856), in order to hold it he must have thus taken the step to become a citizen by declaration of his intention as well as actual residence here; otherwise he could not have possessed it. The declaration required him to renounce on oath "all allegiance and fidelity to any foreign prince, potentate, state or sovereignty, and particularly" to the government of Switzerland. Vide section 2165 of the U. S. Revised Statutes. That Haunstein did take this step does not seem to be denied, and

therefore it may not be amiss to say that Solomon Haunstein's declaration of intention, in the language of the above statute, was found in the corporation court of Richmond, and copied, but too late to be formally spread out in the record. (Record Book of Hustings court for October 20, 1856, No. 23.)

Then, I ask, what rights and benefits can Haunstein, the citizen of the United States, residing here, claim under a Swiss treaty made, on her part, only for the protection of the property *of her own* subjects?

When Haunstein renounced all allegiance to his government and became our citizen, no treaty made for Swiss subjects could avail him or those claiming under him.

The very treaty itself says it was adopted for "their respective *citizens*," living in the country of the other Republic.

Running all through the treaty it says that the citizen of the United States (sojourning in Swizerland) and the citizen of Switzerland (sojourning in the United States) shall have various rights and privileges, and if either should die a loyal subject in the land of the other, if that *other* country *permitted* his alien heirs to hold her real estate, it should pass to them; but the very moment he renounced and abjured his realm, he could no more look to that protection.

The very article of that treaty under which these appellants claim, says that "*the* CITIZENS" (can anything be more definite?) "of each one of the contracting parties shall have power to dispose," &c. Could that provision apply to Haunstein, the citizen of the United States, living in his own country?

The question of the identity of these appellants as the rightful descendants of Solomon Haunstein is seriously presented by the record, and yet not judicially determined anywhere. This matter would not be mentioned before this court but for the unintentional error in the appellants' petition to the Virginia supreme court, where by inadvertence, it is stated that the circuit court "had no doubt upon this point," in their favor. That court simply held, as the supreme court did, that while the tendency of the proof was in that direction, that "latter question will not be decided unless its decision be rendered necessary." (Page 43 of the record.) Before both courts that point was reserved, should it ever become necessary to look carefully to it. Of all the judges who have examined into and passed upon this cause, Judge Christian is the only one of the six who was of opinion that their identity "is clearly proved by the record."

APPENDIX A.

[The following omitted, and to come in before first paragraph on page 10 of appellee's brief:]

"Commonwealth of Virginia,
City of Richmond—*ss:*

In the hustings court clerk's office of said city, October 20th, 1856, Solomon Haunstein, an alien, a native of Switzerland, aged twenty-one years, a tavern-keeper, this day declared on oath, before me, Robert Howard, clerk of the said court, that it is *bona fide* his intention to become a citizen of the United States, and to relinquish and renounce forever all allegiance and fidelity to any foreign prince, potentate, state or sovereignty whatever, and particularly to the republic of Switzerland.

Teste:

RO. HOWARD, *C'lk.*

A copy from the records—Teste:

ANDREW JINKINS, *C'lk.*"

The appellant's printed argument (though not in accordance with rule twenty-one of this court) did not come to hand until after the submission of our brief.

To our surprise, there is there, by some misapprehension of counsel, introduced here a question of costs, nowhere, by the record, before this court; for so said the supreme court of Virginia, when, upon the argument there, this matter was adverted to by the appellant's counsel. It is yet an unadjudicated question before the circuit court of Richmond. And the proposition that the state of Virginia shall, in contravention of chapter 109, Code of Virginia, 1873, pay all the necessary costs (though small) of her years of litigation against many adverse claimants, only that she might generously turn over the entire fund intact to these claimants standing idly by to receive it, is a question (if it should ever arise) which was reserved by the said circuit court of Richmond, and, as before said, the supreme court of Virginia refusing to consider or pass upon it, because it was not before them.

We had learned that the cause was here because of some grave constitutional questions affecting great rights and powers. Now it descends to a question *before this court*, of the payment of a few petty state officers' fees!

THE STATE OF VIRGINIA,
By her Counsel.

But the case we present for Virginia, and the maintenance of the decision of her highest tribunal, needs no such support as this.

If ever there was a cause, stripped of every semblance of necessity for the ever reluctant interposition of the United States courts, where (in the language of this court) those "unseemly and dangerous collisions of judicial authority" should be avoided, and the decisions of the state courts respected and sustained, that case is here presented by this record.

We repeat that no case for the consideration of this court (either by direct effect or influence) is here presented, save the accidental case of the Haunsteins; that under it neither the "binding obligations" of treaties, nor "the peace and honor of the nation," as referred to by Judge Christian, are at issue, or in any way involved. We hear of no question as to the laws of the other states being uninterruptedly all that the appellants could desire. Certainly Virginia law for over twenty years (since April 7th, 1858), and no doubt forever hereafter, is now, and will be, in favor of all that is now asked by these parties, and thus fully granted upon the first suggestion, and in most respectful obedience to a mere intimation from the national government. And if, at the same time, Virginia's highest tribunal had not the right to simply interpret her own plain law (as to its intended application *retrospectively*), is a question we are content, with great confidence, to most respectfully submit to this honorable court.

J. A. LYNHAM,
Of Counsel for the Appellee, the State of Virginia.

J. G. FIELD,
Attorney General for Virginia, and Counsellor before the Supreme Court of the United States.

